Jurisdictional Statement

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In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM F. BOLGER, ET AL., APPELLANTS

v.

YOUNGS DRUG PRODUCTS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether 39 U.S.C. 3001(e)(2), which prohibits the mailing of unsolicited advertisements for contraceptives, is unconstitutional as applied to appellee's commercial mailings.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the appellants are the United States Postal Service and William French Smith, Attorney General.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-18a) is reported at 526 F. Supp. 823.

JURISDICTION

The order of the district court (App. B, *infra*, 19a-20a) was entered on September 30, 1981, and a notice of appeal to this Court (App. C, *infra*, 21a-22a) was filed on October 30, 1981. On December 23, 1981, the Chief Justice extended the time for docketing the ap-

peal to and including February 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981).

STATUTE INVOLVED

39 U.S.C. 3001(e) provides:

> (1) Any matter which is unsolicited by the addressee and which is designed, adapted, or intended for preventing conception (except unsolicited samples thereof mailed to a manufacturer thereof, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic) is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs.
>
> (2) Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement—
>
> > (A) is mailed to a manufacturer of such matter, a dealer, therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or
> >
> > (B) accompanies in the same parcel any unsolicited sample excepted by paragraph (1) of this subsection.
>
> An advertisement shall not be deemed to be unsolicited for the purposes of this paragraph if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive.

STATEMENT

Appellee is a manufacturer and distributor of contraceptive devices. In order to promote those products, appellee determined to embark on a campaign of unsolicited mailings to members of the public at large (App. A, *infra*, 1a-2a). In early 1979, the Postal Service traced an unsolicited advertisement for contraceptives to a wholesaler of appellee's products (*id.* at 4a). It advised the wholesaler of 39 U.S.C. 3001(e)(2), which declares that an "unsolicited advertisement" of a contraceptive device "is nonmailable matter" unless it is mailed to a manufacturer, dealer, physician, pharmacist, or hospital, or is contained in a publication that the addressee has requested. Postal Service regulations, of which the wholesaler and appellee were subsequently informed, specifically exempt from this prohibition materials in which "the mailer has no commercial interest" (Domestic Mail Manual (DMM) Section 123.434 (July 7, 1981)).[1]

The Postal Service considered and rejected appellee's legal argument that Section 3001(e) could not constitutionally prohibit its proposed mailings. Appellee then brought this action, seeking declaratory and injunctive relief, in the United States District Court for the District of Columbia. Appellee offered three types of unsolicited promotional materials as

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[1] The DMM, which is issued pursuant to the Postal Service's broad power to adopt regulations (39 U.S.C. 401) is incorporated by reference into 39 C.F.R. Part 111.

Postal Service regulations provide that an administrative proceeding to determine whether certain materials are mailable may be instituted before an administrative law judge or the Postal Service's Judicial Officer. See 39 C.F.R. Part 953. In addition, 18 U.S.C. 1461 makes it a crime "knowingly [to] use[] the mails for the mailing, carriage in the mails, or delivery of anything declared by * ** section 3001(e) of title 39 to be nonmailable * * *."

examples of its mailings. The district court described these as: "informational pamphlets promoting the desirability and availability of prophylactics in general, and [appellee's] products in particular"; "flyers exclusively or substantially devoted to promoting prophylactics in general, those made by [appellee], and/or those stocked * * * by a particular drugstore * * *"; and "multi-page, multi-item flyers * * * promoting a large variety of products * * * including prophylactics" (App. A, *infra*, 1a-2a).[2] Appellee asserted that Section 3001(e), as applied to its mailings, violated the First, Fifth, and Ninth Amendments (App. A, *infra*, 5a).

The district court held that "all three types of proposed mailings are commercial solicitations" because they are "promotional materials" in which appellee "has a commercial interest" (App. A, *infra*, 7a, 8a n.5). Accordingly, the court considered the constitutionality of Section 3001(e)(2) in light of the standards prescribed by *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980).[3] The court also noted, however, that it con-

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[2] Examples of these materials are reproduced in Appendix C to the complaint.

[3] In *Central Hudson*, the Court identified a "four-part analysis" that has been applied to restrictions on commercial speech (447 U.S. at 566; see App. A, *infra*, 9a-10a):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

sidered appellee's advertisements to be "tasteful expressions" (App. A, *infra*, 2a), and it specifically reserved judgment on the constitutionality of restrictions on "promotion * * * for contraceptive materials * * * done in a tasteless or palpably offensive style" (*id.* at 14a n.8).

Applying the *Central Hudson* standards, the district court concluded that "the government does have a substantial interest" in enforcing Section 3001(e)(2). The court identified two components of this substantial interest—the "protection of the privacy of individuals in their homes from even one mailing that, because of its sexual subject matter, is likely to offend some sensitive addressees," and the "interest in preventing such material from falling into the hands of the children of addressees who do not wish their children to be exposed to it" (App. A, *infra*, 10a-11a).

The district court also ruled that Section 3001(e) "*directly* advance[s]" these governmental interests (App. A, *infra*, 11a; emphasis in original). Indeed, the court stated, Section 3001(e) "would seem to be quite effective in dealing with the problem of unwanted mailings. * * * [S]ince, generally speaking, noncommercial mailers do not mail the avalanche of materials that commercial mailers do, a ban on commercialiy-inspired mailings will go far to achieve the governmental objective involved in this case" (App. A, *infra*, 12a; footnote omitted). In any event, the court said, *Central Hudson* required only that a restriction directly advance the government's interest, not that it be a "complete solution" (*ibid.*).

The district court nonetheless concluded that Section 3001(e)(2) violates the First Amendment "because it is 'more extensive than is necessary to serve the [governmental] interest' " (App. A, *infra*, 12a, quot-

ing *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 572; brackets in original). The court "devised a less restrictive alternative" (App. A, *infra*, 17a), which it then ordered into effect (App. B, *infra*, 19a-20a). That alternative consisted, first, of permitting "multi-item drugstore flyers containing tasteful promotion of contraceptives" to be mailed without restriction, at least so long as "the ad for contraceptives [is] * * * buried in the middle pages of the flyer" and does not "appear[] on the front page of the flyer, or by some other manner of graphic design dominate[] the rest of the flyer" (App. A, *infra*, 13a, 16a & n.10). The court ordered that "flyers and pamphlets devoted exclusively or substantially to promoting the desirability or availability of contraceptives" would be mailable only if they satisfied certain conditions (*id.* at 15a):

> First, they must be mailed in an envelope that completely obscures from the sight of the addressee the contents. Second, the envelope must contain a prominent notice stating in capital letters that the enclosed material has not been solicited in any way by the recipient. Third, the envelope must contain a prominent warning that the contents are "promotional material for contraceptive products." Fourth, the envelope must contain a notice, in less prominent lettering than the warning and the other notice, but not in "fine print," that federal law permits the recipient to have his name removed from the mailing list of the mailer of that envelope, and citing to 39 U.S.C. § 3008(a).[4]

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[4] Section 3008(a) of Title 39 provides:

> Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole

The district court acknowledged that its order did not fully serve all the objectives of Section 3001(e)(2) and that "[i]n particular, these requirements do not provide absolute protection against having material concerning contraception occasionally fall into the hands of inquisitive children" (App. A, *infra*, 18a). But the court declared that it was "satisfied that it has struck the balance that the Constitution mandates" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

39 U.S.C. 3001(e)(2), which applies only to unsolicited advertisements for contraceptive devices mailed to members of the general public for commercial purposes, places, at most, a very limited burden on First Amendment rights. The district court conceded that Section 3001(e)(2) directly advances the government's substantial interest in enabling families to avoid unwanted and offensive promotional materials

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discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to the designated addresses thereof.

The constitutionality of this statute was upheld in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970). The addressee has "unreviewable discretion * * * to determine whether or not the advertisement was 'erotically arousing or sexually provocative'" (*id.* at 739 n.6), and his certification to that effect is final; there is no "power to make any discretionary evaluation of the material in a[ny] governmental official" (*id.* at 737). The district court appears not to have recognized, however, that the plain language of the statute, and the implementing regulations (DMM Section 123.611), require the addressee to certify that the material is erotically arousing or sexually provocative, and some addressees may be unwilling to make such a representation about advertisements of the sort in issue here.

that may fall into the hands of children. The district court nevertheless invalidated the statute because it believed it could devise a superior alternative scheme. But "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby * * * strike legislation down" (*Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173, 188-189 (1979) (Blackmun, J., concurring)). As the district court acknowledged, its approach is not as effective as Section 3001(e)(2) in protecting the governmental interests involved; in addition, the district court's approach may in the end place a greater burden on First Amendment interests than Section 3001(e)(2). Because there was an insufficient basis for the district court to upset the balance Congress struck among the important interests implicated by Section 3001(e)(2), review by this Court is warranted.

1. "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 563. Moreover, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975); see *Metromedia, Inc. v. City of San Diego*, No. 80-195 (July 2, 1981), slip op. 10-11, 15, 25 (plurality opinion); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 91 (1977).

Section 3001(e)(2) imposes, at most, a minimal burden on First Amendment rights. On its face, it applies only to "advertisements"; the Postal Service

has further interpreted it not to apply where the mailer has no "commercial interest" in the materials.[5] Commercial speech, of course, occupies "a subordinate position in the scale of First Amendment values" and is subject to greater regulation than fully protected expression. *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978); see, *e.g.*, *Metromedia, Inc.* v. *City of San Diego*, *supra*, slip op. 13-15 (plurality opinion).[6] Thus this case does not involve the activi-

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[5] In *Associated Students* v. *Attorney General*, 368 F. Supp. 11 (C.D. Cal. 1973), a three-judge court held that this prohibition on the mailing of "advertisements" could not constitutionally be "expand[ed] * * * beyond the[] commercial sense" of the term (*id.* at 24) and had to be interpreted in a way that "recognize[d] the inherent difference between commercial solicitation on one hand and informative editorializing on the other" (*id.* at 23). The Postal Service accepts this holding, and it issued DMM Section 123.434 (see page 3, *supra*) to make this interpretation clear.

[6] The district court found that all the materials involved in this case are commercial speech. The drugstore flyers containing advertisements for contraceptives fall within the core definition of commercial speech—" 'speech proposing a commercial transaction' " (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 562, quoting *Ohralik* v. *Ohio State Bar Association*, *supra*, 436 U.S. at 456; see *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 385 (1973); *Bigelow* v. *Virginia*, 421 U.S. 809, 820-821 (1975); *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942)). The other promotional materials were also "commercial activity" (*Ohralik* v. *Ohio State Bar Association*, *supra*, 436 U.S. at 456), and the fact that they took the form of "advertising that link[ed] a product to a * * * debate" over the various methods of contraception does not entitle them to the "broad constitutional protection" afforded noncommercial speech (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 563 n.5). See also *Metromedia, Inc.* v. *City of San Diego*, *supra*, slip op. 19 (Brennan, J., concurring in the judgment) ("I have no doubt that those who seek to convey

ties—even the unsolicited mailings—of individuals or organizations committed to advocating birth control or family planning as a moral, political, or ideological matter; it concerns only "solicitation for pecuniary gain" (*In re Primus*, 436 U.S. 412, 422 (1978)).

Moreover, Section 3001(e)(2) is in no sense comparable to the state statute, invalidated in *Carey* v. *Population Services International*, 431 U.S. 678, 700-702 (1977), that sought "to suppress completely any information about the availability and price of contraceptives" (*id.* at 700). Advertising that does not rely on the mails is unaffected by Section 3001(e)(2). Any person who seeks information about contraceptive devices may obtain it without restriction even through the mails, because Section 3001(e)(2) applies only to unsolicited materials. Appellee remains free to promote contraceptives in newspapers and other publications that are sent through the mails as long as the publication has been requested by the recipient. This Court has frequently emphasized the hardiness of commercial speech (*e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 564 n.6; *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977)); impelled by the profit motive, appellee and other manufacturers and distributors of contraceptives are likely to be resourceful in devising means of reaching potential customers. For example, the Postal Service does not interpret Section 3001(e)(2) to prohibit a "pre-mailing" that, while not advertising contraceptive products, notifies recipients that such advertisements are available upon request.

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commercial messages will engage in the most imaginative of exercises to place themselves within the safe haven of noncommercial speech, while at the same time conveying their commercial message.").

Commercial speech is protected by the First Amendment principally because of its value to the hearer, not because of its value to the party attempting to sell its wares. See, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 563. See also *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776-786 (1978). Applying Section 3001(e)(2) in the circumstances of this case will, therefore, have an impact on the protected rights only of those who are so uninterested in appellee's products that they have not sought information about them—and then only on such a person's ability to receive that information through the mails in the form of unsolicited promotional materials. To whatever degree consumers generally depend on unsolicited advertisements to guide their decisions about what to buy (see *Virgina State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 763-765 (1976)), it is implausible to suggest that this source of information is of great significance to people making "private and sensitive" decisions (*Carey* v. *Population Services International*, *supra*, 431 U.S. at 685) about contraception.[7]

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[7] Thus, unlike other restrictions on commercial speech that this Court has invalidated, Section 3001(e)(2) is not a "covert attempt by the State to manipulate the choices of its citizens * * * by depriving the public of the information needed to make a free choice" (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 574-575 (Blackmun, J., concurring); see, *e.g.*, *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 94 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens' Consumer Council*, 425 U.S. 748, 770 (1976)). The narrow restriction imposed by Section 3001(e)(2) is, in fact, very poorly designed to influence behavior by reducing the free flow of information; it permits a wide variety of commercial

2. The district court acknowledged that Section 3001(e)(2) directly promotes the government's substantial interests in preventing families from receiving unwanted advertisements that may be offensive and that may, against the parents' wishes, fall into the hands of children. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech * * * does not mean we must be captives everywhere. * * * The asserted right of a mailer * * * stops at the outer boundary of every person's domain." *Rowan* v. *Post Office Department*, 397 U.S. 728, 738 (1970). See also *Carey* v. *Brown*, 447 U.S. 455, 471 (1980). Compare *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951), with *Martin* v. *City of Struthers*, 319 U.S. 141 (1943). The interest in not subjecting addressees to offensive material is particularly strong when the government itself is being made the cause of the intrusion through a "government-created forum[]" (*Metromedia, Inc.* v. *City of San Diego, supra*, slip op. 22 n.19 (plurality opinion))—the Postal Service—that is normally subject to its plenary control (see, *e.g.*, *United States Postal Service* v. *Council of Greenburgh Civil Associations*, No. 80-608 (June 25, 1981), slip op. 11-12). The district court undervalued this interest by explicitly assuming that, if its approach were followed, addressees would receive only "tasteful" unsolicited advertisements. In fact, even if it were possible to draw a distinction between tasteful and tasteless advertisements that is not unconstitutionally vague and a "broad invitation to subjective or discriminatory enforcement" (*Grayned* v. *City of Rockford*,

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and noncommercial information about contraception to reach consumers, and the relatively small amount of information it restricts is among that least likely to play a role in the important decisions consumers make on this subject.

408 U.S. 104, 113 (1972); see, *e.g.*, *Coates* v. *Cincinnati*, 402 U.S. 611 (1971)), any such distinction is likely, in practice, to permit a good deal of offensive material to reach unwilling recipients.

Perhaps more important, unsolicited advertisements for contraceptives can work a "direct interference with the parental guidance that is especially appropriate in this sensitive area of child development" (*Carey* v. *Population Services International*, *supra*, 431 U.S. at 708 (Powell, J., concurring)). In view of the quantity of unsolicited commercial mail—the district court itself recognized that it can reach "avalanche" proportions (App. A, *infra*, 12a; see *Rowan* v. *Post Office Department*, *supra*, 397 U.S. at 736)—there is a significant probability that, if advertisements for contraceptives are left unregulated, some will fall into the hands of children. Whatever protection the First Amendment affords to advocates of birth control as a political or social cause who make such materials available to children on an unsolicited basis, or to those who give commercial information to children who seek it (see *Carey* v. *Population Services International*, *supra*, 431 U.S. at 691-699 (plurality opinion)) unsolicited commercial advertisements are surely entitled to the least protection. Moreover, the form, content, and volume of such advertisements are dictated solely by the sender's commercial interest in selling his product. Compare *Ohralik* v. *Ohio State Bar Association*, *supra*, with *In re Primus*, *supra*. The government has a substantial interest in aiding parents' efforts to discuss sensitive and important subjects such as birth control with their children; here Congress has taken steps to ensure that such discussions, while not isolated from the wide range of information and communication left untouched by Section 3001(e)(2), will at least be

free from the intrusion of inappropriate "junk mail" and unwanted, commercially motivated, solicitations.

3. The district court invalidated Section 3001(e)(2) because it believed it had "devised" a less restrictive alternative. This alternative essentially consisted of allowing advertisements for contraceptives to be mailed to homes that did not request them, if the advertisements were (i) on the inside pages of—and not graphically dominant in—a flyer that advertised other products, or (ii) enclosed in an envelope that notified the recipient of the contents, stated that they were unsolicited, and gave the recipient an opportunity to have his name removed from the sender's mailing list (App. A, *infra*, 13a-15a). See page 7, note 4, *supra*. The district court believed that its approach struck a better balance than the one adopted by Congress.

But "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all [regulatory] powers" (*United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976)) that affect First Amendment rights. The district court conceded that its alternative would be less effective in achieving the legitimate objectives of Section 3001(e)(2); it recognized that the risk of advertisements' falling into children's hands might even be increased by the requirement of an explicit notice on the outside of the envelope (see App. A, *infra*, 18a). By enacting a simple prohibition on the mailings that created this problem, Congress "has gone no farther than necessary in seeking to meet its ends" (*Metromedia, Inc.* v. *City of San Diego*, *supra*, slip op. 16 (plurality opinion)).

Moreover, a recipient who objected to contraceptive advertisements would, under the district court's approach, be forced to remove himself from the

mailer's mailing list entirely,[8] with the result that he would be deprived of information about the mailer's other products—precisely the sort of deprivation that the constitutional protection for commercial speech is designed to *prevent*. The sole gain from the district court's approach would be that appellee, instead of having to use pre-mailings to obtain requests from those who desire its materials, will be able to use the mails to send advertisements to addressees who are not sufficiently interested to request them. For these reasons, the "less restrictive alternative" devised by the district court is not an adequate basis for declaring Section 3001(e)(2) unconstitutional.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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[8] Even if the addressee could specify that he wished not to receive contraceptive advertisements but to receive other mailings, a mailer might well find it uneconomical to maintain two mailing lists or to print two sets of flyers—one with and one without advertisements for contraceptives—so the practical effect of the notification would likely be to cut off all mailings to the objecting addressee.

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA 80-1165

YOUNGS DRUG PRODUCTS CORP., PLAINTIFF

v.

WILLIAM F. BOLGER, ET AL., DEFENDANTS

Filed Oct. 7, 1981

OPINION

I

The plaintiff manufactures, sells, and distributes contraceptive products, marketing them through sales to wholesale distributors and chain warehouses for resale to retail pharmacists. It publicizes the desirability and availability of its product line by means of a sales force, and advertisements in trade publications and popular magazines of nationwide distribution. However, the plaintiff has apparently found its marketing strategy insufficient to reach many of its potential customers. Plaintiff now seeks to supplement its "mix" of marketing tools by arranging promotional activities in conjunction with its wholesalers and retailers. The proposed promotional activities relevant to this case are efforts to mail to the public, on an unsolicited basis, three types of mailings. One type is informational pamphlets promoting the desirability and availability of prophylactics in general, and Youngs' products in particular. The second type is flyers exclusively or substantially

devoted to promoting prophylactics in general, those made by Youngs, and/or those stocked (and perhaps discounted) by a particular drug store or chain of drug stores. The third type is multi-page, multi-item flyers mailed out by a drug store or chain and promoting a large variety of products available and perhaps on discount there, including prophylactics. The plaintiff, its wholesalers and retailers seek to send both types of flyers not just to a drug store's already-known customers, but to the public.

Youngs has submitted samples of the flyers and promotional materials sought to be mailed. *See* Exhibit C. There is no dispute that the materials at issue in this case are tasteful expressions on a subject matter that obviously could lend itself to communications that some would find offensive.[1] However, in this case, not only are the materials not obscene, there is no suggestion that they treat the subject matter of the desirability and availability of contraceptive products in a pandering, suggestive, or graphic way. Accordingly, the Court's opinion is limited to materials similar to those submitted by the plaintiff.

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[1] The Court notes that the plaintiff has submitted a number of more explicit, more potentially offensive advertisements for sexually-oriented products which, Youngs alleges, the Postal Service permits others to mail. *See* Exhibit E. However, all those advertisements are mailed *on a solicited basis*, being either specifically ordered by the addressee or contained in a specifically-ordered publication. Obviously, different interests are brought into play when materials are furnished on request, than when they are sent unsolicited to a member of the public. *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970). Moreover, the statute in question reaches only materials mailed *on an unsolicited basis.*

II

Youngs' proposed promotional campaign clashes with the clear express language of 39 U.S.C. § 3001 (e), which reads in full:

> (1) Any matter which is unsolicited by the addressee and which is designed, adapted, or intended for preventing conception (except unsolicited samples thereof mailed to a manufacturer thereof, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic) is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs.
>
> (2) Any unsolicited advertisement of matter, which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement—
>
> (A) is mailed to a manufacturer of such matter, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or
>
> (B) accompanies in the same parcel any unsolicited sample excepted by paragraph (1) of this subsection.
>
> An advertisement shall not be deemed to be unsolicited for the purposes of this paragraph if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive.

Youngs' promotional campaign also conflicts with Postal Service regulations interpreting the reach of the statute. Section 123.434 of the Domestic Mail Manual reads, in pertinent part:

> Unsolicited advertisements for articles or things which are designed, adapted or intended for preventing conception are nonmailable, except . . . when the mailer has no commercial interest in any such item.[2]

In early 1979, the Postal Service traced an allegation of an unsolicited mailing of advertisements for contraceptive products to the Ketchum Drug Company of New York City, a wholesaler of Youngs' product line. The Service warned Ketchum that the mailing violated the statute. Youngs and Ketchum noted in letters to the Service their view that under *Carey* v. *Population Services International*, 431 U.S. 678 (1977), the Service could not constitutionally restrict the mailing of a drugstore circular listing on the back page a notice that the pharmacy carried prophylactics, with quantities and prices. The letter further stated that "this circular lists many many items and TROJAN is just one among many traditional drugstore items listed." At that time Youngs also furnished the Service with a copy of a flyer devoted exclusively to promoting contraceptives on sale at $5.49 at a particular drugstore, and requested

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[2] The exemption from coverage that the regulations provide to mailers without a commercial interest is a result of the Postal Service's acceptance of, and its interpretation regarding, the decision in *Associated Students* v. *Attorney General*, 368 F. Supp. 11 (C.D. Cal. 1973) (three-judge court) (holding this statute unconstitutional as applied to a student group seeking to mail detailed information about birth control to private homes where off-campus students resided).

the Service's legal opinion on the mailability of both types of flyers, as well as of promotional pamphlets. The Service rejected the view of Youngs and Ketchum in a letter of February 15, 1980. A reasonable reading of that letter is that it addressed all three types of mailings with respect to which there had been recent correspondence between Youngs and the Service, stating the Service's position that the mailing on an unsolicited basis of both types of flyers, as well as promotional pamphlets, would violate 39 U.S.C. § 3001(e). Thereafter, the plaintiff filed this action, claiming that the statute in question unconstitutionally violates the First, Fifth and Ninth Amendments to the United States Constitution, and that Youngs and Ketchum were refraining from distributing advertisements mentioning, promoting or explaining Youngs' products because of the Service's warning. On July 10, 1981 the Court denied Youngs' motion for a preliminary injunction.[3]

III

The Court concludes that the statute in question, by its plain language, prohibits all three types of

[3] The Court was particularly concerned that the defendants might suffer irreparable harm, while it did not appear that the plaintiff ran a substantial risk of such harm. In particular, were the Court ultimately to rule on the merits in favor of the Government's position, the Court feared that the Government's interest in assuring the nonoccurrence of the statutorily-prohibited mailings would be defeated. Indeed, had Youngs taken advantage of a preliminary injunction to launch a huge mass mailing of advertisements and promotional materials to the public, it might have achieved the bulk of the relief it sought on the merits, no matter how the Court ultimately ruled on them.

mailings in this case.[4] Hence, the Court must reach the issue of the constitutionality of the statute as applied to these mailings, in particular, whether the absolute statutory ban on all three types of mailings violates the First Amendment.

The Court notes the opinion in *Associated Students, supra*, which held the statute at issue unconstitutional as applied to mailers who seek to inform addressees, on an unsolicited basis, about the desirability and availability of birth control devices and practices, but have no personal economic interest in doing so. As noted above, the Service has acquiesced in that interpretation.

That case set forth various points concerning the constitutionality of the statute that bear repeating here. First, the statute constitutes a prior restraint of expression, against the constitutional validity of which there is a "heavy presumption." *Associated Students, supra* at 21 (citing, *inter alia*, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963)). Second, "the use of the mails is an important and necessary element of the First Amendment right to free speech. . . ." *Id.* (citing, *inter alia*, *Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971)). Third, "the prohibition of unsolicited, mailed information about contraceptives . . . denies to many persons the knowledge, otherwise lacking, necessary to enable them to

[4] Indeed, the Service argues not that the statute can be read expansively to reach, but rather that it especially covers, multi-item drugstore flyers containing advertising for contraceptives. *See* Defendants' Supplemental Memorandum, at 7 (§ 3001(e)(2) "proscribes the mailing of unsolicited commercial advertisements concerning contraceptives, essentially in the form of drugstore flyers, which are precisely the materials with which the private home owner is likely to be overwhelmed").

make an informed decision as to whether to bear children," an outcome which is troubling from the point of view of constitutional law since, under the holdings of *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), "individuals have a fundamental right to privacy and personal choice in matters of sex and family planning . . . encompass[ing] . . . the decision regarding whether and what types of methods of contraception and family planning may be used to prevent conception." *Associated Students* at 22. The final relevant point from that opinion is its conclusion that, applying the law to the "unsolicited advertisement" language of the statute in question, "the only reasonable interpretation which . . . will preserve the constitutionality of the statute[], is one which recognizes the inherent difference between commercial solicitation on one hand and informative editorializing on the other." *Id.* at 23.

In this case all three types of proposed mailings are commercial solicitations. Accordingly, this Court must consider this case not only in the light of the considerations that formed the basis of the *Associated Students* opinion, but, more importantly, within the framework set forth by the Supreme Court for commercial speech cases. Moreover, the issue in this case is complicated further because, while on the one hand, this *mailer*, because of its commercial interest, has less freedom than the *Associated Students* mailers from regulation of its efforts to communicate with the public as it sees fit, on the other hand, these *mailings*, particularly the flyers, appear to be less explicit and less potentially offensive to sensitive addressees than was the detailed booklet on birth control, and abortion practices and resources in *Associated Students*.

IV

The Commercial Speech Tests [5]

In a series of cases from the last few years, the Supreme Court has made clear that commercial speech enjoys First Amendment protection. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). However, while commercial speech is constitutionally guaranteed expression, it is accorded less protection from government regulation than noncommercial speech. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Virginia Pharmacy, supra*; *Bates, supra*. Indeed, "certain features of commercial speech differentiate it from other varieties of speech . . . [and] may also make inapplicable [to commercial speech] the prohibition against prior restraints." *Friedman* v. *Rogers*, 440 U.S. 1, 10 (1979).

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[5] The Court notes that the plaintiff argues in the alternative that this is not a commercial speech case at all, but rather one of pure speech, albeit in the form of an ad. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (a purchased ad, run in a newspaper and conveying information to the reader and proposing a cash contribution to the purchaser of the ad, held to be pure speech). However, an editorial ad seeking contributions to a fund from like-minded readers is clearly distinguishable from any of the promotional materials involved in this case. In this type of case, the critical distinction between pure and commercial speech is whether the speaker has a commercial interest, as the electric utility had in *Central Hudson* and as manufacturers, distributors, and retailers of prophylactics have in this case. Thus, this is a commercial speech case with respect to all three types of proposed mailings, even though parts of Youngs' promotional pamphlets are probably indistinguishable from parts of the booklets mailed out in *Associated Students*.

Whether the First Amendment protects commercial speech "turns on the nature both of the expression and the governmental interest served by its regulation," *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). However, two recent Supreme Court cases make clear that even a strong and clear governmental interest served by the regulation normally does not outweigh the First Amendment interest in expression. *Central Hudson, supra, Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980). Those cases set out a step-by-step analytical framework for commercial speech cases. By applying that test, in light of the facts of those two cases and the holdings in both that the government regulations were impermissible, it is clear that the three types of mailings before this Court may not be absolutely banned.

The Supreme Court applied the following analysis in those two cases. Since the First Amendment extends to commercial speech because of the informational function of advertising, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978), no First Amendment issue is raised by prohibition of advertising that relates to illegal activity, *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388 (1973), or deceives. *Ohralik, supra* at 464-65. However, "the government's power is more circumscribed" when it attempts to suppress commercial messages that accurately inform the public about lawful activity, as is the case here. *See Central Hudson, supra* at 564. In that event, the government "must assert a substantial interest to be achieved by [the] restrictions." If it does, as it has in this case, then the restriction is "in proportion to that interest." The *Central Hudson* opinion

is particularly helpful since it spelled out the two requirements of that restriction/interest proportionality test:

> First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the execessive restrictions cannot survive.

Id.

V

Application of the Commercial Speech Test to this Case

a. *The substantiality of the governmental interest*

This Court finds that the Government does have a substantial interest to be achieved by this statute.[6] The Government states that interest as "protecting the privacy of individuals in their homes." Since there is a statute, upheld by the Supreme Court in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970), that affords an addressee an absolute right to prohibit any mailings to him from any mailer who has ever sent him a mailing that he, in his sole discretion, deems "erotically arousing or sexually provocative," 39 U.S.C. § 3008(a), the governmental interest is more accurately stated as protection of the privacy of individuals in their homes from even

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[6] The Court notes its surprise to learn that in *Associated Students, supra* at 22, the Government "did not present any interest which might form the justification for this restraint on free speech."

one mailing that, because of its sexual subject matter, is likely to offend some sensitive addressees. Especially when the related interest in preventing such material from falling into the hands of the children of addressees who do not wish their children to be exposed to it, is considered, this Court concludes that the governmental interest is a substantial one.

b. *The "Directness" Prong*

The Supreme Court ruled in *Central Hudson* that the New York Public Service Commission's complete prohibition of electric utility advertising promoting the use of electricity *did* directly advance the state interest in energy conservation since "there is an immediate connection between advertising and demand for electricity." *Central Hudson, supra* at 569. There is a similarly "direct link" in this case between the state interest, namely, the protection of the privacy of individuals from exposure to offensive material, even once, in their homes and the means of advancing that interest; namely, a prohibition of all mailings, on an unsolicited basis, promoting contraceptives by mailers with a commercial interest in such promotion. Moreover, as long as regulations on commercial speech First Amendment rights *directly* advance the governmental interest, it is constitutionally sufficient that they reduce the problem; they need not eliminate it. *Cf. Bates, supra* (invalidating Bar prohibition of attorney advertising because the regulation only *indirectly* advanced the state interest in maintaining high standards of attorney integrity). Youngs has stressed the fact that under the statute and the Postal Service regulations interpreting it, a mailer without a commercial interest in contracep-

tives may expose individuals in their homes to possibly offensive material. Indeed, Youngs argues, such a mailer may mail substantially the same sort of pamphlet that Youngs, its wholesalers and retailers may not. Youngs' argument simply misses the point that the standard is "direct link," not complete solution. Moreover, the means would seem to be quite effective in dealing with the problem of unwanted mailings. Supreme Court opinions have recognized that commercial speech has a greater hardiness, based on the profit motive that fuels it, than noncommercial speech. *See Virginia Pharmacy, supra* at 771-72 n. 24 ("commercial speech may be more durable than other kinds"; "advertising is the *sine qua non* of commercial profits"; an "attribute [of commercial speech is its] hardiness"); *Bates, supra* at 380-81. Thus, especially since, generally speaking, noncommercial mailers do not mail the avalanche of materials that commercial mailers do,[7] a ban on commercially-inspired mailings will go far to achieve the governmental objective involved in this case, and is hardly "totally ineffectual," as Youngs argues. Plaintiff's Reply Memo, at 10.

c. *The Least Restrictive Means Prong*

Reaching the last part of the test, this Court finds, as did the Supreme Court in *Central Hudson*, that this regulation of commercial speech is constitutionally impermissible because it is "more extensive than is necessary to serve the [governmental] interest." *Central Hudson, supra* at 572. As in that case, the

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[7] The Court recognizes, though, that the emergence of well-organized direct mail efforts by mailers with an ideological interest has lessened to some extent the "commonsense differences between commercial speech and other varieties."

Government here "has not demonstrated that its interest . . . cannot be protected adequately by more limited regulation of appellant's commercial expression." *Id.* at 570. In *Central Hudson*, the Court suggested a number of obvious less restrictive means that New York had at its disposal to further its conservation policy. For instance, the Court noted, the State "could attempt to restrict the format and content of Central Hudson's advertising . . . for example, [by] requir[ing] that the advertisements include information about the relative efficiency and expense of the offered service. . . ." *Id.* at 571. Likewise, in *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975), reviewing a conviction for violation of a statute prohibiting acceptance of advertising promoting abortion clinics, the Court noted an obvious less restrictive alternative (though its holding struck down the statute on other sufficient grounds). *See also* Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 249-51 & nn. 239-40 (1976).

Here the effect of the statute and the regulations is that under no conditions may a commercially-interested mailer mail to the public on an unsolicited basis, any material promoting or mentioning the desirability or availability of contraceptives. The Court concludes that under the line of Supreme Court commercial speech cases cited *supra*, the application of the statute and the regulations to the three types of mailings involved in this case cannot withstand less-restrictive-alternative scrutiny.

Therefore, this Court will order, first, that multi-item drugstore flyers containing tasteful promotion of contraceptives, may be mailed to the same extent that such flyers could be mailed if they did not con-

tain such promotion.[8] The Court relies on *Consolidated Edison, supra*, in particular, where the Supreme Court reviewed New York's highest court's determination that bill inserts promoting nuclear power plants intruded upon individual privacy because the public "ha[s] no choice whether to receive the insert and the views expressed in the insert may inflame their sensibilities." The Court ruled that the fatal flaw in that determination was an "err[oneous] assessment of the seriousness of the intrusion." *Id.* at 541. The same is true here. As the Court noted there, again in words that apply equally to the insertion in multi-item[9] drugstore flyers of tasteful promotion of contraceptive products, "even if a short exposure to [the petitioner's] views may offend the sensibilities of some consumers, the ability of government 'to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" *Id.* This Court simply must conclude that where the exposure is as short as it will be in the case of a tasteful promotion for prophylactics in a multi-item drugstore throwaway flyer, and hence where the risk of offending the

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[8] The Court reiterates that it has no occasion on the facts of this case to consider the mailability of such flyers if the promotion they contain for contraceptive materials is done in a tasteless or palpably offensive style. For reasons stated in the text, however, this Court doubts that drugstore flyers present a serious risk of frequently containing tasteless or palpably offensive promotion of any product.

[9] The Court notes that *many* of the items listed may be offensive to some one. For instance, in the drugstore flyer from the Park Plaza Pharmacy of the Bronx, New York, submitted to this Court as an exhibit in this case, there are ads for a number of feminine products, mention of which may well be offensive to sensitive addressees.

sensibilities of a large number of addressees seems so speculative, there has been an "erroneous assessment of the seriousness of the intrusion." There has been an *insufficient showing* that *substantial* privacy interests will be invaded in an *essentially intolerable* manner.

Second, with respect to flyers and pamphlets devoted exclusively or substantially to promoting the desirability or availability of contraceptives, this Court will order that such materials are mailable only under the following conditions. First, they must be mailed in an envelope that completely obscures from the sight of the addressee the contents. Second, the envelope must contain a prominent notice stating in capital letters that the enclosed material has not been solicited in any way by the recipient. Third, the envelope must contain a prominent warning that the contents are "promotional material for contraceptive products." Fourth, the envelope must contain a notice, in less prominent lettering than the warning and the other notice, but not in "fine print," that federal law permits the recipient to have his name removed from the mailing list of the mailer of that envelope, and citing to 39 U.S.C. § 3008(a).

The Court concludes that, with respect to materials devoted exclusively or substantially to promoting contraceptives, nothing less than the envelope, notice and warning requirement set out above would be a reasonable less restrictive alternative for advancing the governmental interest in protecting the privacy of individuals in their homes from mailings they find offensive. The combination of the envelope's complete obscuring of the contents, the notice that the material is unsolicited, and the warning indicating the predominant subject matter of those contents, substantially enhances the "wastebasket" remedy. Taken together, they make it likely that persons who would

find the contents offensive will resort to that remedy without opening the envelope and being offended. The fourth requirement substantially enhances the Section 3008(a) remedy by alerting addressees to the existence of the statute as a protection against any future mailings from that mailer.

Finally, the format ordered by this Court goes far in achieving a companion government interest of particular concern to the Court. Due to the sexual nature of the subject matter at issue in this case, there is an interest in ensuring, to the extent constitutionally permissible, that it not fall into the hands of children whose parents do not wish them to be exposed to subject matter of a sexual nature, regardless of the style of presentation. The multi-item flyer does not present a serious threat to that interest, since the ad for contraceptives in such flyers will likely be—as it is in the exhibit submitted to the Court in this case, *see* Exhibit C—buried in the middle pages of the flyer.[10] However, it is a central concern in the case of the "exclusive or substantial" flyer and the pamphlet, whether sent by a local retailer or Youngs into the home. Yet in *Consolidated Edison*, even though the unsolicited, possibly offensive material *was being mailed to the home*, the Supreme Court nevertheless cited with approval the rule of *Cohen* v. *California*, 403 U.S. 15 (1971) (possibly offensive material in court hallway) that the recipients of a message they find offensive have an "averting the eyes" or "wastebasket" remedy. Pamphlets and fly-

[10] The Court notes that if the promotion of contraceptives appears on the front page of the flyer, or by some other manner of graphic design dominates the rest of the flyer, then a court might decide to treat the flyer as one "devoted in substantial part to the promotion of contraceptives." In that event, the flyer would come under the envelope, notice, and warning requirement.

ers promoting contraceptives, when mailed in an opaque envelope containing the warning and notices ordered by this Court, are at least as good an example as the inserts promoting nuclear energy in *Consolidated Edison* of the sufficiency of the "wastebasket" remedy: In both instances, the addressee "may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket." *Consolidated Edison, supra* at 542. Moreover, it is quite unlikely that drugstore flyers will contain tasteless or graphic promotion of contraceptives. No drug store will send out flyers that do not prominently feature its name. Once a drug store prominently features its name on its flyers, it sets itself up to be the target of a boycott by any recipient offended by them.[11] Indeed, this check will be so effective, as a practical matter, that this Court can certainly imagine that in some communities or in certain neighborhoods or areas therein, drug stores will refrain from including any promotion of contraceptive products in any of their flyers notwithstanding this Court's holding in this case.

The Court believes that it has devised a less restrictive alternative that does not limit the commercial speech rights of mailers any more than necessary in order to significantly advance the Government's substantial interests in protecting personal privacy and keeping subject matter of a sexual nature from falling into the hands of children inadvertently. On the other hand, the Court concludes that this alterna-

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[11] That "remedy" will be an especially effective check on tasteless promotion of contraceptives in multi-item drugstore flyers in many communities, where, as in this area, the major drug stores deal in everything from prescription drugs and general health care products, to groceries, magazines and counter meals.

tive, unlike some of the others that it has considered such as a pre-mailing followed by a mailing only to those who have returned a card soliciting further promotional materials, does not impose a serious financial burden on the exercise of those rights.

As in any balance, of course, the requirements ordered by the Court do not achieve, to the fullest extent imaginable, all the aims of the competing interests. In particular, these requirements do not provide absolute protection against having material concerning contraception occasionally fall into the hands of inquisitive children. However, the requirement of an opaque envelope and the fairly technical language of the warning, that is, "contraceptive products" as opposed to, say, "materials having to do with sex," will reduce, though not to zero, the above problem. Especially where free speech rights are on the other side of the balance, no reduction to zero on the governmental interest side can be realistically expected. In sum, this Court is satisfied that it has struck the balance that the Constitution mandates.[12]

Dated: October 6, 1981

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

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[12] This Court has also considered the defendants' argument that the statute is a reasonable restriction on the manner of Youngs' exercise of its free speech rights. The Court concludes that the statute and the regulations go to the content of the communication—information about contraceptives—and not to the manner of that communication—unsolicited mailing of commercial information. Indeed, were the Postal Service really in the business of restricting this *manner* of communication, few of us would recognize our mailboxes.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA 80-1165

YOUNGS DRUG PRODUCTS CORP., PLAINTIFF

v.

WILLIAM F. BOLGER, ET AL., DEFENDANTS

Filed Sept. 30, 1981

ORDER

The Court having concluded for the reasons set forth in its Opinion that Title 39, Section 3001(e)(2) of the United States Code, not being the least restrictive alternative that will still advance the substantial governmental interest involved in this case, is unconstitutional as applied to the plaintiff which, in cooperation with wholesalers and retailers of its products, seeks to mail to the public tasteful flyers and pamphlets promoting the desirability and availability of its contraceptive products, it is hereby

ORDERED that the first type of materials sought to be mailed, multi-item drugstore flyers promoting a variety of products, including contraceptives, are mailable to the same extent they would be if those flyers did not contain promotion of contraceptives, and it is further

ORDERED that the second and third types of material sought to be mailed, flyers and pamphlets devoted exclusively or substantially to promoting the desirability or availability of contraceptives, are

mailable only if they comply with all the conditions that form part of the less restrictive alternative indicated by the Court. First, all such flyers and pamphlets must be mailed in an envelope that completely obscures the contents. Second, the envelope must contain a prominent notice stating: "THE ENCLOSED MATERIAL HAS NOT BEEN SOLICITED IN ANY MANNER WHATEVER BY THE RECIPIENT." Third, the envelope must contain a prominent warning stating: "THE CONTENTS ARE PROMOTIONAL MATERIAL FOR CONTRACEPTIVE PRODUCTS." Fourth, the envelope must contain a notice, in less prominent lettering than the other notice and the warning, but not in "fine print," stating: "Federal law permits you, the recipient, to have your name removed from the mailing list of the mailer of this envelope; just contact the United States Postal Service" and citing to 39 United States Code § 3008(a).

Dated: September 30, 1981

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1165

YOUNGS DRUG PRODUCTS CORP., PLAINTIFF

v.

WILLIAM F. BOLGER, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given this 30th day of October, 1981, that defendants William F. Bolger, *et al.*, appeal to the Supreme Court of the United States, pursuant to the provisions of sections 1252 and 2101 of Title 28 of the United States Code, from the final judgment of this Court entered in this action on the 30th day of September, 1981.

Respectfully submitted,

/s/ Charles F. C. Ruff
CHARLES F. C. RUFF
United States Attorney

/s/ Royce C. Lamberth
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Joint Appendix

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No. 81-1590

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM F. BOLGER, ET AL., APPELLANTS

v.

YOUNGS DRUG PRODUCTS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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Jurisdictional Statement Filed February 25, 1982
Probable Jurisdiction Noted May 17, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1590

WILLIAM F. BOLGER, ET AL., APPELLANTS

v.

YOUNGS DRUG PRODUCTS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

1980

May 7—1-Complaint; Exhibits A-E.

May 7—Summons (4) and copies (4) of the complaint issued.

Jun 9—4-Motion of pltf for preliminary injunction; P&A's.

Jun 27—5-Memorandum of P&A's of defts in opposition to pltf's motion for a preliminary injunction; exhibits A thru D.

Jul 3—7-Reply memorandum of P&A's of pltf in support of its motion for a preliminary injunction; table of contents; table of authorities.

Jul 8—Motion of pltf for preliminary injunction taken under advisement. Govt's reply to pltfs' briefs is to be filed by 7-18-80. Pltfs' response is to be filed by 7-25-80. Hearing on merits set for 7-31-80 @ 9:30 a.m. (Rep: T. Leppo) Penn, J.

Jul 11—8-Answer of defts to complaint.

Jul 14—Calendared C/D (N).

Jul 18—9-Supplemental Memorandum of P&A's of defts.

Jul 28—11-Response of pltf to defts' supplemental memo of P&A's.

Jul 31—Motion of pltf for permanent injunction heard and taken under advisement. (Rep: J. McGinn) Penn, J.

1981

Mar 3—13-Motion of pltf for the entry of a preliminary injunction; memo of P&A.

Mar 18—14-Opposition of defts to pltf's motion for a preliminary injunction.

May 27—Renewed motion of pltf for preliminary injunction heard and taken under advisement. (Rep: Paula Estes) Penn, J.

Jul 10—15-Order denying motion of pltf for preliminary injunction. (N) Penn, J.

Aug 3—16-Notice of Appeal by plaintiff from order of July 10, 1981. $5.00 filing fee and $65.00 docketing fee paid & credited to U.S. Copy mailed to John Bates, Esq.

Aug 4—Copy of Notice of Appeal and docket entries transmitted to USCA; USCA No. 81-1882.

Sep 3—Record of Appeal delivered to USCA.

Sep 30—18-Order finding first type of materials mailable with certain conditions; finding second and third types of materials mailable with certain conditions as to flyers, pamphlets and envelopes and certain notice to recipients. (see order for details). (N) Penn, J.

Oct 7—19-Opinion. (N), Penn, J.

Oct 22—20-Certified Copy of Order from USCA dated 10-21-81 granting motion to dismiss appeal.

Oct 30—21-Notice of Appeal of defts from order 9-30-81; no fee-government; copies sent to: O'Toole; H. Hubschman; R. Graham.

Oct 30—Copies of notice of appeal and docket entries transmitted to USCA. USCA #81-2170.

Nov 4—Record on Appeal delivered to USCA. Receipt acknowledged 11-9-81.

Nov 10—22-Transmittal Letter from USCA returning 1 volume original and 2 volumes transcripts and 1 exhibit (bound booklet). (Record on appeal from 81-1882 only).

Nov 25—23-Certified Copy of Order from USCA dated 11-25-81 terminating appeal.

Nov 30—24-Notice of Appeal of defts from final judgment of 9-30-81; no fee-government; copies sent to: R. Graham and F. O'Toole.

Dec 1—25-Transmittal Letter from USCA returning original record (remaining pleadings).

Dec 1—Corrected Entry for October 30, 1981: Notice of Appeal to the Supreme Court by defts from order of 9-30-81; no fee-government.

Dec 2—Copies of docket entries and notice of appeal transmitted to USCA. USCA #81-2268.

Dec 28—26-USCA notified that attorney is to decide if appeal should go to USCA or Supreme Court. Receipt acknowledged 12-30-81.

1982

Jan 11—Record On Appeal delivered to USCA. Receipt acknowledged 1-19-82.

May 20—27-Certified copy of the order of the Supreme Court noting probable jurisdiction.

Jun 4—28-Certified Copy of Order of USCA dated 6-3-82 dismissing appeal due to lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NO.

YOUNGS DRUG PRODUCTS CORPORATION,
865 Centennial Avenue, Piscataway, New Jersey,
a New Jersey Corporation,

Plaintiff,

v.

WILLIAM F. BOLGER, Postmaster General,
United States Postal Service,
475 L'Enfant Plaza W, S.W., Washington, D.C. 20260;
BENJAMIN CIVILETTI, Attorney General of the United States,
10 Pennsylvania Avenue, N.W., Washington, D.C. 20530;
and the UNITED STATES POSTAL SERVICE,
475 L'Enfant Plaza W, S.W., Washington, D.C. 20260,

Defendants.

VERIFIED COMPLAINT (FOR DECLARATORY AND INJUNCTIVE RELIEF)

Plaintiff, Youngs Drug Products Corporation, a New Jersey corporation, complains against defendants William F. Bolger, Postmaster General, United States Postal Service; Benjamin Civiletti, Attorney General of the United States; and The United States Postal Service, and says as follows:

JURISDICTION AND VENUE

1. This is an action seeking an injunction against enforcement and a declaration of unconstitutionality of a federal civil statute, Title 39 United States Code, Section 3001(e) (hereinafter the "Statute"), which, in pertinent part, declares any unsolicited advertisement of contraceptive matter nonmailable in the United States mails.

2. This Court has jurisdiction over this Complaint, in that the matter in controversy exceeds the sum of $10,000.00, ex-

clusive of interest and costs, and arises under the Constitution and laws of the United States, 28 U.S.C. § 1331(a); the Complaint seeks the resolution of an actual controversy within the province of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; it involves matters within this Court's jurisdiction over improper agency action of the United States Postal Service, pursuant to the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*) and the Mandamus Act (28 U.S.C. § 1361); and it concerns postal matters over which this Court has original jurisdiction (28 U.S.C. § 1339). This Court also has jurisdiction in that the matter in controversy arises under the Constitution and laws of the United States regulating commerce or protecting trade and commerce against unlawful restraints, 28 U.S.C. § 1337.

3. Venue is proper in this District, pursuant to 28 U.S.C. § 1391(e), in that the causes of action alleged involve officers and employees of the United States acting under color of legal authority and concern challenged action of an administrative agency of the United States. All defendants maintain offices in this District. Plaintiff does business in this District.

PARTIES

4. Plaintiff Youngs Drug Products Corporation (hereinafter "Youngs") is a New Jersey corporation engaged for almost sixty years in the manufacture and sale of contraceptive products. In the regular course of its business activities, Youngs has engaged in the advertising and sale of its products of a nationwide and local basis. In this connection, Youngs has regularly advertised its products for order and sale in national magazines, including *Playboy* and *Penthouse*. In addition, Youngs has regularly sold its products to wholesale distributors and chain warehouses for resale to retail druggists located throughout the United States and has regularly employed salesmen throughout the United States who promote and sell its products.

5. Defendant William F. Bolger is the Postmaster General of the United States Postal Service, responsible for the administration and operation of the United States Postal Service in

accordance with the Constitution and laws of the United States, including enforcement of Title 39 U.S. Code Section 3001(e). Defendant Benjamin Civiletti is the Attorney General of the United States, in charge of the administration and operation of the Unied States Justice Department and responsible for the enforcement of federal statutes, including Title 39 U.S. Code, Section 3001(e). The defendant United States Postal Service is the federal agency charged with the administration and delivery of the mails of the United States.

The Challenged Statute

6. At all times material herein, there has been in effect a federal civil statute, Title 39 U.S. Code, Section 3001(e) (the "Statute"), which provides in pertinent part:

> ". . . (e)(1) any matter which is unsolicited by the addressee and which is designed, adapted, or intended for preventing conception [except unsolicited samples thereof mailed to a manufacturer thereof, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic] is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs.
>
> (2) Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement —
>
> (A) is mailed to a manufacturer of such matter, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or
>
> (B) accompanies in the same parcel any solicited sample excepted by paragraph (1) of this subsection.
>
> An advertisement shall not be deemed to be unsolicited for the purposes of this paragraph if it is contained in a publication for which the addressee has paid or promised

to pay a consideration or which he has otherwise indicated he desires to receive. . . ."

A true and correct copy of Title 39 U.S. Code, Section 3001(e) is appended hereto and incorporated herein as Exhibit A.

7. Defendants, in an effort to implement the Statute, have promulgated postal regulations which, in pertinent part, declare any unsolicited advertisement of contraceptive matter nonmailable, except in limited circumstances not material here. A true and correct copy of these postal regulations is appended hereto and incorporated herein as Exhibit B.

FACTUAL ALLEGATIONS

8. In the regular course of its business activities, Youngs has attempted to enter into arrangements with its wholesalers and retail pharmacy customers requesting that they mail Youngs' advertisements and promotional pieces, on an unsolicited basis, to their customers (by wholesalers to retail pharmacists and by retail pharmacists to their retail pharmacy customers). These advertisements and promotional pieces are designed (a) to inform prospective customers of the type, quality, and costs of Youngs' products; (b) to increase public awareness and knowledge of the range of contraceptive products available in the marketplace; (c) to communicate with past and prospective customers with respect to the range of family planning aids and techniques available to them; and (d) to enable Youngs to engage in informative editorializing with the public in connection with the need for and desirability of contraceptive products, family planning, and contraception. Representative examples of Youngs' advertisements, which Youngs desires to send without prior solicitation through the mails, are appended hereto and incorporated herein as Group Exhibit C.

9. In light of Youngs' efforts to enter into and implement the aforesaid arrangements with its wholesalers and retail pharmacy customers, the defendants have informed Youngs and certain of its wholesale distributors that any mailing of Youngs' advertisements through the mail, on an unsolicited

basis, will result in prosecution of Youngs and/or its wholesalers and retail pharmacy customers for violation of the Statute. Such prosecution would subject Youngs and its wholesalers and retail pharmacy customers to the civil penalties of the Statute itself and/or to the criminal penalties imposed by 18 U.S.C. § 1461 for violation of the Statute. An example of defendants' efforts to prevent the mailing of Youngs' advertisements to retailers and to the public, on an unsolicited basis, is Exhibit D appended hereto, a letter from M. Locker, a United States Postal Inspector, to Ketchum Drug Company, a Youngs wholesale distributor.

10. These acts and threats of defendants described above do and will severely impair the rights and abilities of Youngs, its wholesalers, its retail pharmacy customers, and its present and prospective customers (a) to communicate with respect to the type, quality, and costs of Youngs' products; (b) to communicate with respect to the range of contraceptive products available in the marketplace; (c) to communicate with respect to the range of family planning aids and techniques available; and (d) to communicate with respect to Youngs' editorial position in connection with the need for and desirability of contraceptive products, family planning, and contraception. These acts and threats of defendants severely impair the rights and abilities of Youngs to carry out its business activities and to enter into contractual arrangements with its wholesalers and/or retail pharmacy customers to disseminate Youngs' advertisements and promotion pieces. Furthermore, these acts and threats of defendants deter, limit, and adversely affect Youngs' present and prospective customers in their access to information and education concerning venereal disease control, birth control, and the decision as to whether to bear a child—a decision which is at the heart of their fundamental rights of privacy.

11. In addition, defendants' restrictions on Youngs' rights and activities pursuant to the Statute are overbroad, vague, and not rationally designed to regulate the dissemination of contraceptive matters and contraceptive advertising through the mails. The statute, both on its face and as applied by

defendants, singles out—for special treatment and classification as "nonmailable"—all advertisements of contraceptive matters which are "unsolicited". The statute, both on its face and as applied by defendants, permits the dissemination of contraceptive matters and advertising through the mails which are significantly more sexually and verbally explicit than Youngs' advertising, as long as such matters are "solicited" by the public or contained in a publication or magazine for which the addressee has paid or promised to pay. Representative examples of advertisements and promotional pieces currently permitted by both the terms of the statute and defendants' application of the statute are appended hereto and incorporated herein as Group Exhibit E.

12. Youngs has requested the defendants to forego application of the Statute to Youngs' advertising, but defendants have refused such requests.

13. The deprivations and restrictions imposed upon Youngs, its wholesalers, its retail pharmacy customers, and its present and prospective customers by the Statute, both on its face and as applied by defendants, are arbitrarily and unreasonably imposed. The Statute is grossly disproportionate to any legitimate governmental purpose and is not justified by any proper governmental objective. The Statute is justified neither by a rational nor a compelling governmental interest and is not narrowly drawn to express any such interest.

14. Youngs has no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and will suffer irreparable injury from defendants' acts or omissions unless granted the relief prayed for herein.

First Cause of Action

15. As a direct and proximate result of the aforesaid acts and omissions of defendants, their agents and employees, acting in their official capacities, under the color of federal law, Youngs, its wholesalers, its retail pharmacy customers, and its present and prospective customers have been subjected to unlawful prior restraints depriving them of their federal con-

stitutional rights to freedom of speech guaranteed by the First Amendment.

16. No adequate governmental justification exists for the arbitrary denial of these federal constitutional rights to freedom of speech.

Second Cause of Action

17. As a direct and proximate result of the aforesaid acts and omissions of defendants, their agents and employees, acting in their official capacities, under the color of federal law, Youngs, its wholesalers, its retail pharmacy customers, and its present and prospective customers have been denied their federal constitutional rights to the equal protection of the laws guaranteed by the Fifth Amendment.

18. No adequate governmental justification exists for the arbitrary denial of these federal constitutional rights to the equal protection of the laws.

Third Cause of Action

19. As a direct and proximate result of the aforesaid acts and omissions of defendants, their agents and employees, acting in their official capacities, under the color of federal law, Youngs, its wholesalers, its retail pharamacy customers, and its present and prospective customers have been denied their federal constitutional rights to the due process of law guaranteed by the Fifth Amendment.

20. No adequate governmental justification exists for the arbitrary denial of these federal constitutional rights to due process of law.

Fourth Cause of Action

21. As a direct and proximate result of the aforesaid acts and omissions of defendants, their agents and employees, acting in their official capacities, under the color of federal law, Youngs, its wholesalers, its retail pharmacy customers, and its present and prospective customers have been denied their

federal constitutional rights to privacy guaranteed by the Ninth Amendment and the Constitution of the United States.

22. No adequate governmental justification exists for the arbitrary denial of these federal constitutional rights to privacy.

Demand for Relief

WHEREFORE, plaintiff Youngs Drug Products Corporation respectfully prays that this Court:

1. Declare Title 39, U.S. Code, Section 3001(e) to be unlawful and unconstitutional on the grounds that it violates he First, Fifth and Ninth Amendments of the United States Constitution.

2. Issue a preliminary and permanent injunction prohibiting the defendants, and each of them, from enforcing Title 39, U.S. Code, Section 3001(e) against plaintiff, its wholesalers, its retail pharmacy customers, and/or any of its present or prospective customers.

3. Issue a Writ of Mandamus permitting plaintiff, its wholesalers, and/or its retail pharmacy customers to mail and requiring defendants to accept for mailing and to deliver as mailed plaintiff's unsolicited advertisements of contraceptive matters sent to plaintiff's wholesalers, its retail pharmacy customers, and/or any of plaintiff's present or prospective customers.

4. Award plaintiff its costs and attorneys' fees.

5. Grant such further relief as may be appropriate and just.

Youngs Drug Products Corporation

By: _____
One of Its Attorneys

Francis J. O'Toole, Esq.
Fried, Frank, Harris,
Shriver & Kampelman
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 342-3500

JEROLD S. SOLOVY
ROBERT L. GRAHAM
CHRISTOPHER VARNER
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Date: ____

VERIFICATION

Bruce MacFarlane, Vice President of Youngs Drug Products Corporation, hereby states that the facts and information contained in the Complaint hereto are true and correct to the best of his knowledge and belief.

/s/ Bruce MacFarlane
BRUCE MACFARLANE, Vice President

Subscribed and sworn to before me this 31st day of March, 1980.

/s/ Joann Lynn Pino
JOANN LYNN PINO
Notary Public

AFFIDAVIT

MILTON J. BRYSON, on oath, deposes and says:

1. I am the Marketing Director for Youngs Drug Products Corporation ("Youngs"). My office is located at 865 Centennial Avenue, Piscataway, New Jersey. I have been Marketing Director for Youngs for approximately 20 years. In that capacity, I oversee a sales force of approximately 100 persons, review company policies, and direct the marketing efforts of Youngs.

2. Youngs is a New Jersey corporation engaged in the manufacture and sale of contraceptive products. Among the wholesale distributors for Youngs' products is Ketchum Drug Company ("Ketchum") of New York, New York. Ketchum's customers, in turn, are retail pharmacies.

3. For the last several years, Youngs has engaged in business discussions with Ketchum concerning the distribution of advertisements and fliers about Youngs' contraceptive products. In particular, Youngs would like Ketchum to distribute advertisements concerning Youngs' products on an unsolicited basis through the mail to its retail pharmacy customers. In addition, Youngs and Ketchum would like to be able to make arrangements with Ketchum's retail pharmacy customers, whereby those retail pharmacy customers would, in turn, distribute advertisements on an unsolicted basis through the mail concerning Youngs' products to their respective customers and the public.

4. An example of a circular seeking to advertise Youngs' products is appended hereto as Exhibit 1. This circular, prepared under Ketchum's direction in the fall of 1979, includes advertisements about many products, including detergent, shampoo, tooth paste, and contraceptive products manufactured by Youngs (i.e, Trojan prophylactics).

5. In October, 1979, the United States Postal Service informed Ketchum that the distribution of advertising circulars, like Exhibit 1, on an unsolicited basis would violate a federal statute. A copy of a letter to Ketchum from Postal Inspector M. Locker to that effect is appended hereto as Exhibit 2. Upon

receipt of Exhibit 2, Ketchum informed Youngs that Ketchum would be forced to refrain from distributing Youngs' advertisements and promotional pieces, like Exhibit 1, to its customers.

6. Since the receipt of Exhibit 2, Ketchum and Youngs have refrained from distributing Youngs' advertisements and promotional pieces on an unsolicited basis to Ketchum's customers. Youngs, however, remains ready, willing, and able to distribute its ads to the public on an unsolicited basis. Examples of the ads which Youngs would like to distribute in this manner are appended hereto as Exhibits 3-5. In fact within the last several months, Youngs and Ketchum have again reviewed the possibility of distributing Youngs' ads to Ketchum's customers and to the public on an unsolicited basis.

7. Due, however, to the warnings by the Postal Service (as set forth in Exhibit 2 hereto), Youngs and Ketchum have continued to refrain from mailing Youngs' ads on an unsolicited basis to this date.

Further affiant sayeth not.

/s/ Milton Bryson
MILTON BRYSON

Subscribed and sworn to before me this 19th day of May, 1981.

/s/ Linda A. Mischik
LINDA A. MISCHIK
Notary Public


PARK PLAZA PHARMACY
1773 University Avenue
Bronx, New York
583-5900
SALE STARTS TODAY! SALE ENDS IN 14 DAYS OR WHEN SUPPLIES ARE EXHAUSTED!
...GO ON A SPRING SAVINGS SPREE...
MARTINSON COFFEE
RED-REG. or BLUE-FINE
1-lb Can
1.89 EA.
TIDE DETERGENT
GIANT SIZE-49 oz.
1.48 PKG.
NOT AVAILABLE IN SUFFOLK COUNTY
Chicken of the Sea TUNA
CHUNK WHITE-IN OIL
6½ oz. Can
77¢ EA.
COTTONELLE Toilet Tissue
COTTONY SOFT
4 PK.
88¢ PK.
PROFESSIONAL TEK TOOTH BRUSHES
ASST COLORS & SIZES
5 FOR 88¢
SAFETY CUSHIONED ENDS
Q-TIPS COTTON SWABS
FLEXIBLE STICKS
59¢
2¼ oz. BOTTLE CHARLIE COLOGNE
7.75 VALUE
OR
3 oz. BOTTLE JONTUE SPRAY
7.50 VALUE
Your Choice! 5.88
We Reserve The Right To Limit Quantities
Not Responsible For Typographical Errors

Exhibit 1


HEALTH AND
Beauty Aids
BIG SAVINGS
ALBERTO VO5 HAIR SPRAY
REG. OR HARD TO HOLD
1.49 EA.
3.19 Value
WELLA BALSAM INSTANT CONDITIONER
REG. OR EXTRA BODY
1.17 EA.
16 oz. 2.49 VALUE
WELLA BALSAM SHAMPOO
NORMAL OR OILY
1.77 EA.
3.75 VALUE
TONI SILKWAVE
1.77 EA.
2.79 VALUE
HEAD & SHOULDERS SHAMPOO
1.79 EA.
EFFERDENT DENTURE CLEANSER
1.38 EA.
TYLENOL
EXTRA-STRENGTH TYLENOL TABLETS
1.66 EA.
MENNEN SPEED STICK
89¢ EA.
FLICKER LADIES SAFETY SHAVER
89¢ EA.
MYLANTA ANTACID LIQUID
1.49 EA.
2.75 Value
AYDS REDUCING CANDY
2.99 EA.
BUF-PUF CLEANSING SPONGE
1.49 EA.
TRIM NAIL CLIPS
33¢ EA.
DISPOSABLE BIC SHAVER
PKG. OF 6
44¢ EA.
PLAYTEX 20'S DEODORANT TAMPONS
1.59
30'S STAYFREE MAXI-PADS
1.88 EA.
WITH FLUORISTAN CREST TOOTHPASTE
79¢ EA.
MOISTURIZING NIVEA CREME
1.38
SCOPE MOUTH WASH
24 oz. BOTTLE
1.29
We Reserve The Right To Limit Quantities — Not Responsible For Typographical Errors


POPCORN
16 oz. Cello-Pak
88¢ BAG
The Same Tasty Popcorn That's Served at the Movie Theatres
ONE POUND
13¢ OFF
DAWN DISH DETERGENT
22 oz. BOTTLE
88¢ BTL.
NOT AVAILABLE IN SUFFOLK CO.
CRUNCH
Nestlé
YOUR CHOICE NESTLE MINIATURES
Choose Bags Of:
•Milk Chocolate
•100,000 Bars
•Choco-Lite Bars
•Crunch Bars
1.44 EA.
10 DISPOSABLE TRASH BAGS
Fits 20/30 Gallon
69¢ PKG.
1.39 VALUE
SPONGE-O-MATIC SPONGE MOP
3.59 EA.
15 TALL KITCHEN GARBAGE BAGS
Large 44 Qt. Size
69¢ PKG.
1.39 VALUE
Sergeant's
SERGEANT'S FLEA & TICK COLLAR
For Small to Large Dogs, Puppies or Cats
1.49
1.29 Value!
PLASTIC TUBULAR HANGERS
8 FOR $1.00
•Tattoo •White •Chocolate
NO NONSENSE COMFORT STRIDE PANTY HOSE
1.79 EA.
PLAYTEX LIVING GLOVES
WITH FREE GLOVE
FREE GLOVE
1.27 EA.
ORNAMENTAL AIR FRESHNER
Assorted Styles
66¢ EA.
5" PLASTIC ASHTRAYS
3 FOR $1.00
Assorted Colors
EVEREADY ALKALINE BATTERIES
1.47
2.99 VALUE
.97¢
1.39 VALUE
SAFE GUARD
SAFE GUARD
10W40 DELUXE MOTOR OIL
By Safeguard
49¢
Limit 1 Case Per Customer
WATERFINGERS MASSAGER by CONAIR
Reg. Price 19.99
Sale Price 13.99
Mfg's Rebate 5.00
Your Final Cost 8.99
Model # WF 1
Deluxe hand held shower massager relaxes, massages and makes you better also it makes a shower an experience
SALE PRICE
PANASONIC LED DIGITAL AM/FM CLOCK RADIO
MFG. SUGG. LIST 29.95
29.88 EA.
CONAIR 120 WATT PRO COMPACT DRYER
Regular Price 16.99
9.99 EA.
SALE PRICE


EVENFLO
BABY PRODUCTS
Clear Plastic Nurser
• 4 oz or 8 oz. CLEAR PLASTIC NURSER
• FORMULA NIPPLES-AMBER 3'S
• JUICE NIPPLES-ORANGE 3'S
• MILK NIPPLES-PINK 3'S
• WATER NIPPLES-BLUE 3'S
Your Choice! 3 FOR 1.00
JOHNSON'S
BABY POWDER
14 oz. Size
1.28
Q-TIPS
COTTON SWABS
170's
59¢
THICK, SOFT CUSHIONY
SCOTT BABY FRESH WIPES
Cleans gently and thoroughly.
Package of 40
97¢
ROLLED
LATEX CONDOMS
Trojan-enz Lubricated
12's 1.69
ROLLED
LATEX CONDOMS
Trojan's Ribbed
12's 2.27
FAST, EFFICIENT
PHOTO PROCESSING
C126-20
or C110-20
KODAK
FILM
Your Choice!
1.44 EA.
SYLVANIA
FLASH
BAR
1.77 EA.
SYLVANIA
MAGI-
CUBES
REG. 1.77
1.37 EA.
SYLVANIA
FLIP
FLASH-10
1.37 EA.

Mr. Steve Young
Ketchum Drug Company
16 East 40th Street
New York, New York 10016

Dear Mr. Young:

Pursuant to our conversation regarding the mailing of unsolicited materials, enclosed is a copy of 39 USC 3001(e). If I can be of additional assistance to you, please feel free to contact me at P.O. Box 1184, Church Street Station, New York, NY 10008, telephone 264-5559.

/s/ M. Locker
M. LOCKER, Postal Inspector

Enclosure

EXHIBIT 2

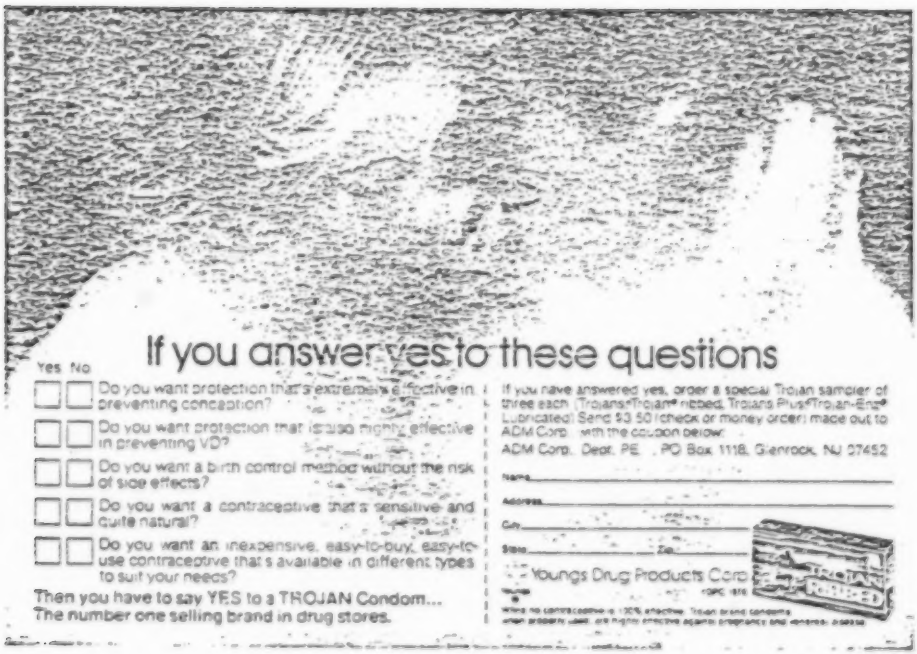

If you answer yes to these questions
Yes No
Do you want protection that's extremely effective in preventing conception?
Do you want protection that is also highly effective in preventing VD?
Do you want a birth control method without the risk of side effects?
Do you want a contraceptive that's sensitive and quite natural?
Do you want an inexpensive, easy-to-buy, easy-to-use contraceptive that's available in different types to suit your needs?
Then you have to say YES to a TROJAN Condom...
The number one selling brand in drug stores.
If you have answered yes, order a special Trojan sampler of three each: Trojans®Trojans® ribbed, Trojans Plus®Trojan-Enz® Lubricated! Send $3.50 (check or money order) made out to ADM Corp. with the coupon below:
ADM Corp., Dept. PE, PO Box 1118, Glenrock, NJ 07452
Name
Address
City
State
Zip
Youngs Drug Products Corp
TROJAN
RIBBED

Exhibit 3a


If you love children but want to schedule your new arrivals, the certain way to plan yours is with Trojan brand prophylactics. They're safe, sure and of course, have no unpleasant side effects. Ask your pharmacist for Regular, Ribbed for greater sensitivity, Guardian and Naturalamb.
Young's Drug Products Corporation
How can controls fail you?

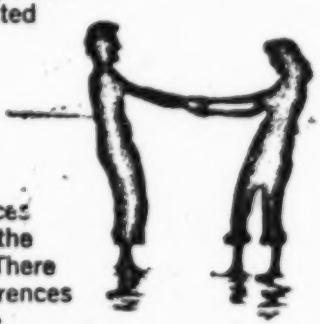
Exhibit 3b



Exhibit 4

What is a Condom?

The condom (prophylactic) is a sheath or cover for the penis... worn during sexual intercourse to help keep the male sperm from entering the vagina and contacting the female egg. At the same time, the condom is a prophylactic since it aids in the prevention of a venereal disease being transmitted through sexual intercourse from an infected person to a non-infected person.



Is the Condom New?

No.

The condom traces its origin back to the 16th Century. There are historical references that, during the Egyptian era, condoms were made out of papyrus soaked in water and out of sheaths made from moistened linen fabric. The invention of the condom, or at least its name, has been attributed to a physician in the Court of King Charles II by the name of Dr. Condom.

What are modern Condoms made of?

Today's quality condoms are made either of natural latex (rubber) or specially processed natural membrane material (lambskin).

3

How are Condoms manufactured?

The manufacture of today's quality condoms is a modern, efficient, streamlined and quality controlled process taking place on an "assembly line" as long as a football field. While it is a rather complex process, it can basically be described as follows: Rotating glass forms, each representing an individual rubber condom, are dipped into a vat of natural latex rubber carefully compounded with other ingredients to assure continuous quality. The rotating glass form then goes through a "curing" process consisting mainly of heat and then the whole process is repeated a second time. At the end of the process the individual condoms are removed from the glass forms . . . and, in the case of TROJAN®-brand condoms, are dusted with the purest and finest powders. They are then prepared for the testing process, lubrication, unit packaging and shipment.

How are Condoms tested?

TROJAN-brand rubber condoms are electronically tested by a process where each condom is put on a stainless steel form and dipped into a highly electrically charged water bath. Even the smallest holes will thus transmit the electrically charged water to the stainless steel form which will close the circuit and give indication that this condom cannot be further processed. It will automatically be rejected from the assembly line and ground into scrap.

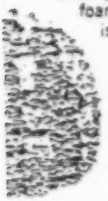
4

Why all the talk about Condoms?

Because today, more than ever in history, the condom is playing a major role as an aid in:

- The prevention of pregnancy
- The prevention of venereal and other diseases that may be transmitted sexually

Yes! The condom, when properly used is BOTH a contraceptive and a prophylactic! Unlike other drugs, foams, pills and devices, the condom is the only contraceptive with this proven value as a prophylactic. And, most importantly, the condom performs this dual role without any dangerous side effects.



How do you properly use a Condom?

BEFORE INTERCOURSE

1. Place the condom on the penis as soon as erection occurs, prior to genital contact or penetration.

2. Pull the condom over the head of the penis. Leave about ¼" space at the end. (Some condoms have small receptacle ends (ers) which provides the required space.) Squeeze end slightly to release air to avoid an air pocket.



3. Slowly unroll until entire penis has been covered.

AFTER INTERCOURSE

4. Promptly withdraw the penis before losing erection. Grasp open end of condom tightly to avoid having it slip off. During withdrawal this will prevent spillage that might transmit infection or cause pregnancy.



5. To further reduce chance of venereal disease, immediately wash the penis and surrounding area.

6. Do not use vaseline or any other oil base lubricants with latex (rubber) prophylactics.

5

Are Condoms helpful in preventing other unwanted complications or diseases that result from sexual activity?

Yes!

While there is still much debate, medical authorities are beginning to recognize that sexual activity may be the means of transmitting a number of diseases. Various common forms of Vaginitis (such as Trichomonas) can be transmitted sexually. There is also the scientific possibility that certain virus-caused conditions might be associated with cancer of the prostate in men and cancer of the cervix in women when these viruses (such as Herpes Simplex II) are sexually transmitted back and forth between male and female.

Does using a Condom reduce sensitivity and sexual satisfaction?

No!!!

By offering the condom user a wide choice of modern materials such as natural latex (the material used in surgeon's gloves)... natural animal membrane and various lubricants, the whole range of sensitivity requirements is satisfied. As a matter of fact, the finest condoms are thinner than a human hair... and thinness is the first step towards sensitivity. Because the use of a condom gives protection against venereal disease and pregnancy, couples using the condom are more relaxed... and sexual satisfaction may be more easily obtained.



App. 15

6

WHAT ARE THE DIFFERENT TYPES OF CONDOMS AND WHAT ARE THEIR ADVANTAGES?

Natural Membrane Condoms...

Truly a different type of condom... because it is made from the most natural of materials... a lamb membrane. They have the same strength and give the same protection and assurance as rubber condoms... but because they are a natural membrane they feel better... feel more natural... and conduct more of the sensitivity than latex (rubber) condoms do. Modern lambskin condoms are lubricated and rolled for further sensitivity and convenience.

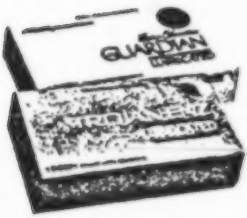


TROJAN-Brand NATURALAMB®

are individually tested, rolled, easy to open, lubricated, natural membrane condoms.

Lubricated Rubber Condoms... "Jelly" type

Lubricated rubber condoms offer the advantage of easier penetration and greater sensitivity than non-lubricated rubber condoms. The more commonly known "jelly" lubricant uses a surgical, non-petroleum base.



TROJAN-Brand GUARDIAN®

(a premium lubricated product) and

TROJAN-ENZ®

LUBRICATED

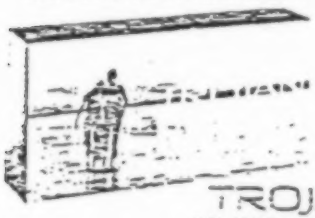
are "jelly" type lubricated condoms.

7

For Her Pleasure
(which of course means more pleasure for both partners)

Specially Ribbed Condoms...

the latest in condom technology,
scientifically textured with
delicate ribs for her pleasure...
specially lubricated with a dry silicone
lubricant for the ultimate in sensitivity.



TROJAN
RIBBED

GOLDEN TRANSPARENT
CONDOMS

are specially lubricated and ribbed
for her pleasure.

Lubricated Rubber Condoms...
Special "Dry" type



GOLDEN COLORED
TROJANS *Plus*®

is a condom lubricated with
a special silicone lubricant, which
many people prefer.

8

Shaped and Colored Condoms...

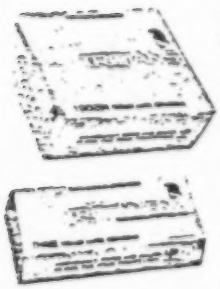
Some rubber condoms have a special (body-hugging) shape fit and feel more natural. And when pastel colored and combined with special lubricants, they offer the maximum sensitivity and satisfaction in rubber condoms.



GOLDEN COLORED TROJAN-Ples

is a naturally shaped, specially "dry" lubricated condom.

Dry Rubber Condoms...



For those people who prefer a dry condom, there are basically two types... the blunt or rounded end... and those with a special receptacle (reservoir) end to provide a natural air space for extra safety.

TROJANS®

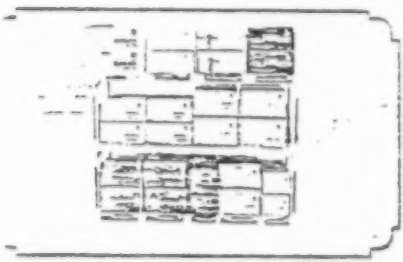
TROJAN-ENZ®

are examples of these two types of dry condoms.

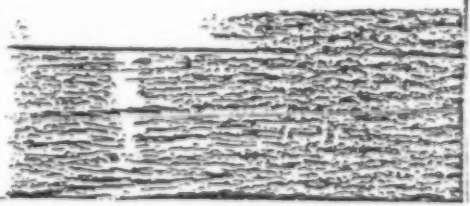
9

...Are Condoms difficult to purchase?

No!... Pharmacies throughout the United States are the traditional and best source of quality brand condoms. By virtue of his or her experience as a trained member of the community health team, the pharmacist is best able to offer a wide selection of condom types and package sizes.



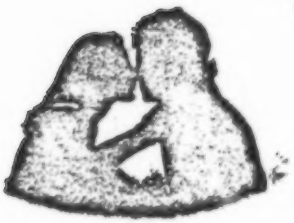
More and more pharmacies today have quality brand condoms on open display to make selection and purchase easier.



10

Are Condoms expensive?

The prices of condoms, of course, vary with the type of material used and any additional features added (i.e., whether it's lubricated or not).

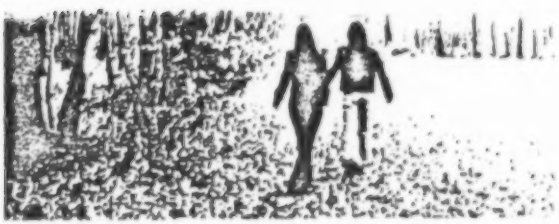


However, when one considers the condom from the viewpoint of its effectiveness and the absence of side effects, the cost is rather minimal.

Are Condoms easy to use?

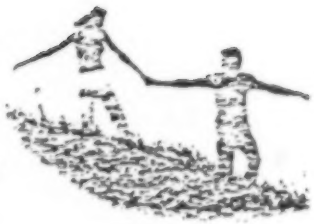
Yes! Modern pre-rolling and air-tight, individual unit packaging make them very easy to store...open...handle...and use.

Many couples today are incorporating the placement and use of the condom into their sexual foreplay... thus adding to the mutual enjoyment of sexual intercourse.



11

How safe are Condoms?



Ethical manufacturers require strict standards of strength, durability and reliability in manufacturing condoms (prophylactics). Each condom must be individually tested to assure a quality condom.

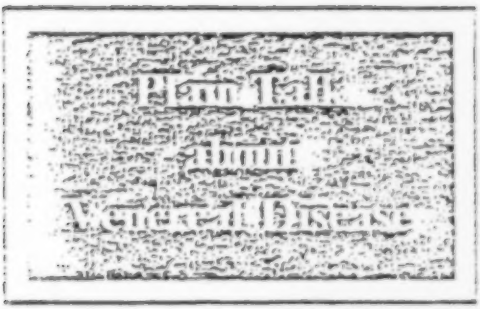
What type of usage, packaging and storage conditions provide maximum assurance of continuous Condom quality?

For maximum protection and assurance, make sure the condoms you purchase are:

- Individually sealed in air-tight containers
- Stored at room temperature... away from extreme heat or cold
- Used only once and then discarded

Further information about condoms may be obtained from physicians, clinics, Public Health authorities... and remember, your Community Pharmacist is the best source for information about... and the selection of... quality condoms.

PRINTED SEPTEMBER 1977



OVER TWO AND ONE HALF MILLION VICTIMS EACH YEAR ... PREVENTION IS THE KEY TO VENEREAL DISEASE CONTROL

©YDP CORP 1978

Exhibit 5

What Is Venereal Disease?

Venereal Disease (VD) is the general name given to those diseases caused by organisms (germs) which are transmitted from persons who already have the disease to other persons either by sexual intercourse or by close body contact involving the sex organs, mouth and/or rectum.

Must There Be This Intimate Sexual Contact To Spread Venereal Disease?

Yes. The organisms causing these diseases can't live very long when exposed to light and air away from warm moist areas of the human body. Thus, there is little danger of becoming infected with Syphilis or Gonorrhea from public toilets, door knobs, drinking cups or eating utensils.

Is There More Than One Type Of Venereal Disease?

Yes, but the two most common kinds of Venereal Disease are Syphilis and Gonorrhea.

Are There Other Names For Venereal Disease Besides Syphilis And Gonorrhea.

Yes. Syphilis is sometimes called *pox*, *lues*, *bad blood*, *siff* and *old Joe*. Gonorrhea is sometimes called *clap*, *strain*, *gleet*, *morning drop*, "*a dose*" and "*the whites*".

Is Venereal Disease On The Increase?

Yes. Venereal disease now constitutes a public health emergency of the first order . . . killing, crippling and seriously endangering the mental and physical well-being of millions of people.

Gonorrhea is the leading reported communicable disease in this Country and Syphilis is third. *Venereal Disease strikes someone in the United States every 12 seconds . . . 5 new victims every minute!*

Why Is Infectious Venereal Disease Increasing So Rapidly?

The answer is complicated, but here are just some of the contributing factors:

- Many people have VD but don't recognize the symptoms.
- The contraceptive effectiveness of the "pill" has led to more frequent sexual relations without regard to the need for VD prevention.
- Lack of knowledge of what causes Venereal Disease.
- People who recognize symptoms and then get treated often fail to have all their sex contacts examined and treated.
- Casual attitude about the dangers of Venereal Disease.
- Shame and embarrassment of admitting and reporting a case of Venereal Disease.
- Failure to get prompt and proper treatment.
- Lack of funds for VD control programs.
- *People take very dangerous risks by not practicing Venereal Disease prevention such as using a quality prophylactic.*

Who Gets Venereal Disease?

Venereal Disease can and does attack the young and old, the male and female, and people of all social classes. However, it most frequently attacks teenagers and young adults.

Does Any Person Have Immunity An To Venereal Disease?

No. A person can be re-infected again and again . . . *and again!*

Can Somebody Be Infected With Both Syphilis And Gonorrhea The At Same Time?

Yes.

How Dangerous Is Venereal Disease?

Many people die each year from untreated Syphilis. One in ten untreated victims of Syphilis will become permanently crippled heart victims. One in twelve afflicted will develop Syphilitic insanity. One in one hundred will lose their eye sight. An overall rate of one in twenty-five of those afflicted will become in some way permanently crippled or incapacitated due to Syphilis. Untreated Gonorrhea can and does cause serious physical damage, such as sterility, heart trouble, arthritis and blindness . . . and the psychological problems that accompany these physical problems can be disabling.

Can You Tell When Or Whether Another Person Has Venereal Disease?

No. There is no immediate or sudden change in general appearance and no definite pattern of symptoms to the uneducated eye.

What Are The Early Symptoms Or Signs Of Syphilis?

The first sign of infection is a single, painless sore where the germ has entered the body. This sore is called a Chancre (pronounced shank-er). It appears between two to six weeks after exposure to the infected person. This Chancre or sore will disappear even without treatment, but this only means that the disease has gone deeper into the body. *The disease is not cured.* The secondary stage of Syphilis which begins two to six months after the Chancre, can include skin rashes over all or part of the body, baldness, sore throat, fever and headaches. Even these will disappear without treatment, *but the disease is still in the body* . . . just waiting to create such "final" problems as crippling the nervous system, syphilitic insanity, heart disease and death.

What Are The Early Symptoms Or Signs Of Gonorrhea?

In the male, the first symptoms appear two to eight days after contact with the infected person and consist of a discharge of pus from the penis, painful inflammation in the urina-

ry canal, which causes burning upon urination, and a frequency and urgency in urination. With females, Gonorrhea can go undetected. It may begin with a burning in the genital area, and there may or may not be a slight vaginal discharge that could be attributed to some other routine problem. Untreated, the infection can spread into the reproductive tract. It may enter the abdomen and can cause peritonitis. After the acute infection subsides, it may be followed by a period of chronic infection which may result in sterility. Women can be infectious and be able to transmit the disease without even knowing they have it.

Can Venereal Disease Be Transmitted In Pregnancy To The Unborn Child?

Gonorrhea can be transmitted to the eyes of the unborn child as it passes through the infected birth canal during delivery. In pregnancy, transmission of the Syphilitic infection to the unborn child occurs through the infection of the mother . . . when the germs pass from the mother's blood stream into the blood stream of the unborn child. The child may be infected anytime from three months to the time of delivery. If the mother's infection is not treated in the first three months, the probability of still-birth is quadrupled . . . the possibility of infant death is almost doubled . . . and up to 80% of the remaining children suffer from congenital Syphilis depending on the duration of the mother's infection.

Can Venereal Disease Be Treated?

Yes! With prompt and proper diagnosis, the medical profession has available many drugs to treat Gonorrhea and Syphilis. The key to the treatment is the word, "PROMPT". Only a qualified physician can detect and treat Venereal Disease. Appropriate laboratory tests (a blood test for Syphilis and a smear or culture test for Gonorrhea) are essential in aiding the physician to detect Venereal Disease. Anyone the least bit suspicious of having Venereal Disease or suspicious of having intimate contact with a person infected with Venereal Disease

should immediately contact their physician and/or Public Health Authorities.

Can Venereal Disease Be Prevented?

Yes!

How?

"When properly used, the most respected and time-proven *aid in the prevention* of Venereal Disease is the *Prophylactic* . . . also known as 'condom', 'skin', 'rubbers', 'safes', 'pros', 'etc.'."[1] Other methods of prophylaxis are thorough cleansing of the male and female sexual areas . . . douching by females and urination by males after sexual intercourse.

Of course selective sexual behavior, avoiding sexual contact with infected or possibly infected persons, is one of the best ways to prevent Venereal Disease.

Is The Prophylactic (Condom) A Contraceptive?

Yes, and has long been recognized as one of the most effective contraceptives.

When And How Should The Condom Be Used As A Prophylactic And/Or Contraceptive?

For the condom to be an effective aid in the prevention of Venereal Disease or unwanted pregnancy *it must be* put on the erected penis before any sexual contact is made . . . right at the very start of any sexual activity.

Do Other Contraceptive Methods Prevent Venereal Disease?

No! People must be made aware that other drugs, pills and devices used for contraception have no established value in preventing Venereal Disease. The prophylactic (Condom), when properly used, is the only device that is proven as *both a prophylactic and a contraceptive.*

---

[1] Warren A. Ketterer, M.D., Chief, Venereal Disease Section, California State Department of Public Health.

Are Prophylactics Safe?

Ethical Manufacturers require strict standards of strength, durability, and reliability in manufacturing condoms. (prophylactics) Each condom must be individually tested to assure a quality condom.

Where Are Prophylactics Most Easily Obtained?

Pharmacies throughout the United States have been the traditional source of quality-brand prophylactics. Unlike other distributors or vendors . . . the pharmacist, by virture of his experience and as a trained member of the community health team, is best able to offer the particular prophylactic to serve the individual need. The pharmacist "is a community leader who is trusted by the average citizen as a source of health related advice—second only to the physician."[2]

Are Prophylactics Difficult To Use?

Absolutely not. Modern methods of producing, pre-rolling and packaging prophylactics make them very easy to open, handle and use.

Does Using A Prophylactic Reduce Sensitivity?

By offering the user a choice of modern prophylactic materials such as liquid latex (the material used in surgeons gloves) . . . natural animal membrane and special lubricants the whole range of required sensitivity levels are satisfied.

Where Can Further Information On Venereal Disease Be Obtained?

This information is readily available from physicians, clinics and Public Health Authorities. And remember, your community pharmacist is the best source for medically-recommended products to aid in the prevention of Venereal Disease.

---

[2]Jesse L. Steinfeld, M.D., Surgeon General, Public Health Service, Department of Health, Education and Welfare.

. . . and it is worth repeating, VENEREAL DISEASE CAN BE PREVENTED.

"When properly used, the most respected and time-proven aid in the prevention of Venereal Disease is the Prophylactic . . . also known as 'condom', 'skin', 'rubbers', 'safes', 'pros', 'etc.'." Other methods of prophylaxis are thorough cleansing of the male and female sexual areas . . . douching by females and urination by males after sexual intercourse.

Of course selective behavior, avoiding sexual contact with infected or possibly infected persons, is one of the best ways to prevent Venereal Disease.

For the condom to be an effective aid in the prevention of Venereal Disease or unwanted pregnancy it must be put on the erected penis before any sexual contact is made . . . right at the very start of any sexual activity.

Contributed as a public service by: YOUNGS DRUG PRODUCTS CORPORATION, P.O. Box 5, Piscataway, N.J. 08854, Distributor of TROJAN® brand prophylactics. Sold in pharmacies only.

AFFIDAVIT

ARTHUR J. KOVAR, on oath, deposes and says:

1. I am the Eastern Regional Advertising Manager for Ketchum Drug Company ("Ketchum"). My office is located at 909 Remsen Avenue, Brooklyn, New York. I have been employed by Ketchum for approximately 30 years and have served in my present capacity for the past six years.

2. Ketchum is in the business of selling drugs and sundries on a wholesale basis. For many years, Ketchum has done business with Youngs Drug Products, Inc. ("Youngs"). Youngs is engaged in the sale of contraceptive products. Ketchum has served as a wholesale distributor for Youngs' products. Ketchum's customers, in turn, are retail pharmacies.

3. For the last several years, Ketchum has engaged in business discussions with Youngs concerning the distribution of advertisements and fliers about Youngs' contraceptive products. In particular, Ketchum would like to distribute advertisements concerning Youngs' products on an unsolicited basis through the mail to its retail pharmacy customers. In addition, Ketchum would like to be able to make arrangements with its retail pharmacy customers, whereby those retail pharmacy customers would, in turn, distribute advertisements on an unsolicited basis through the mail concerning Youngs' products to their respective customers and the public.

4. An example of a circular seeking to advertise Youngs' products is appended hereto as Exhibit 1. This circular, prepared under Ketchum's direction in the fall of 1979, includes advertisements about many products, including detergent, shampoo, tooth paste, and contraceptive products sold by Youngs (i.e., Trojan prophylactics).

5. In October, 1979, the United States Postal Service informed Ketchum that the distribution of advertising circulars, like Exhibit 1, on an unsolicited basis would violate a federal statute. A copy of a letter to Ketchum from Postal Inspctor M. Locker is appended hereto as Exhibit 2. Upon receipt of Exhibit 2, Ketchum informed Youngs that Ketchum would be

forced to refrain from distributing Youngs' advertisements and promotional pieces, like Exhibit 1, to its customers.

6. Since the receipt of Exhibit 2, Ketchum refrained from distributing Youngs' advertisements and promotional pieces on an unsolicited basis to Ketchum's customers. Ketchum, however, remains ready, willing, and able to distribute Youngs' ads to the public on an unsolicited basis. In fact, within the last several weeks, I have had discussions with Youngs' salesmen concerning Ketchum's desire to engage in the distribution of Youngs' ads to Ketchum's customers and to the public on an unsolicited basis.

7. Due, however, to the warnings by the Postal Services (as set forth in Exhibit 2 hereto), Ketchum has continued to refrain from mailing Youngs' ads on an unsolicited basis to this date.

Further affiant sayeth not.

/s/ Arthur J. Kovar
ARTHUR J. KOVAR

Subscribed and sworn to before me this 21st day of May, 1981.

/s/ Ed Rice
ED RICE
Notary Public


PARK PLAZA PHARMACY
1773 University Avenue
Bronx, New York
583-5900
SALE STARTS TODAY! SALE ENDS IN 14 DAYS OR WHEN SUPPLIES ARE EXHAUSTED!
...GO ON A
SPRING $AVINGS
SPREE...
MARTINSON
COFFEE
RED-REG. or BLUE-FINE
1-lb Can
1.89 EA.
TIDE
DETERGENT
GIANT SIZE-49 oz.
1.48 PKG
NOT AVAILABLE IN SUFFOLK COUNTY
Chicken of the Sea
TUNA
CHUNK WHITE-IN OIL
6½ oz. Can
77¢ EA.
COTTONELLE
Toilet Tissue
COTTONY SOFT
4 PK.
88¢ PK.
PROFESSIONAL
TEK
TOOTH
BRUSHES
ASS'T COLORS
& SIZES
5 FOR 88¢
SAFETY CUSHIONED
ENDS
Q-TIPS
COTTON
SWABS
FLEXIBLE
STICKS
59¢
170'S
2¼ oz. BOTTLE
CHARLIE
COLOGNE
7.75 VALUE
OR
3 oz. BOTTLE
JONTUE
SPRAY
7.50 VALUE
Your Choice! 5.88
We Reserve The Right To Limit Quantities
Not Responsible For Typographical Errors

Exhibit 1


HEALTH AND
Beauty Aids
at BIG SAVINGS
ALBERTO VO5 HAIR SPRAY
REG. OR HARD TO HOLD
1.49 EA.
3.19 Value
WELLA BALSAM INSTANT CONDITIONER
REG. OR EXTRA BODY
1.17 EA.
16 oz. 2.49 VALUE
WELLA BALSAM SHAMPOO
NORMAL OR OILY
1.77 EA.
3.75 VALUE
TONI SILKWAVE
1.77 EA.
3.79 VALUE
HEAD & SHOULDERS SHAMPOO
1.79 EA.
EFFERDENT DENTURE CLEANSER
1.38 EA.
EXTRA-STRENGTH TYLENOL TABLETS
1.66 EA.
MENNEN SPEED STICK
89¢ EA.
FLICKER LADIES SAFETY SHAVER
89¢ EA.
MYLANTA ANTACID LIQUID
1.49 EA.
2.75 Value
AYDS REDUCING CANDY
2.99 EA.
BUF-PUF CLEANSING SPONGE
1.49 EA.
TRIM NAIL CLIPS
33¢ EA.
DISPOSABLE BIC SHAVER
PKG. OF 4
44¢ EA.
PLAYTEX 28'S DEODORANT TAMPONS
1.59
30'S STAYFREE MAXI-PADS
1.88 EA.
WITH FLUORISTAN CREST TOOTHPASTE
79¢ EA.
MOISTURIZING NIVEA CREME
1.38
SCOPE MOUTH WASH
24 oz. BOTTLE
1.29
We Reserve The Right To Limit Quantities — Not Responsible For Typographical Errors


POPCORN
16 oz.
Cello-Pak
88¢ BAG
The Same Tasty Popcorn That's Served at the Movie Theatres
Fresh Popcorn
ONE POUND
DAWN DISH DETERGENT
22 oz. BOTTLE
88¢ BTL.
NOT AVAILABLE IN SUFFOLK CO.
YOUR CHOICE NESTLE MINIATURES
Choose Says 3"
•Milk Chocolate
•100,000 Bars
•Chuck Full Bars
•Crunch Bars
1.44 EA.
10 DISPOSABLE TRASH BAGS
Fits 20/30 Gallon
69¢ PKG.
1.39 VALUE
SPONGE-O-MATIC SPONGE MOP
3.59 EA.
15 TALL KITCHEN GARBAGE BAGS
Large 44 Qt. Size
69¢ PKG.
1.39 VALUE
SAVE
Sergeant's
FLEA & TICK COLLAR
SERGEANT'S FLEA & TICK COLLAR
For Small to Large Dogs, Puppies or Cats
1.49
2.29 Value!
PLASTIC TUBULAR HANGERS
8 FOR $1.00
•Yellow •White •Chocolate
NO NONSENSE COMFORT STRIDE PANTY HOSE
Sizes
1.79 EA.
PLAYTEX LIVING GLOVES WITH FREE GLOVE
FREE GLOVE
1.27 EA.
ORNAMENTAL AIR FRESHNER
Assorted Styles
66¢ EA.
5" PLASTIC ASHTRAYS
3 FOR $1.00
Assorted Colors
EVEREADY ALKALINE BATTERIES
AA or C or D
1.47
2.99 VALUE
9V
97¢
1.69 VALUE
SAFE GUARD
10W40 DELUXE MOTOR OIL
By Safeguard
49¢
Limit 1 Case Per Customer
WATERFINGERS MASSAGER by CONAIR
Reg. Price 19.99
Sale Price 13.99
Mfg's Rebate 5.00
Your Final Cost 8.99
Deluxe hand held shower massager delivers massages and relieves tired, sore muscles & stress at an economical
PANASONIC LED DIGITAL AM/FM CLOCK RADIO
MFG. SUGG. LIST 39.95
29.88 EA.
CONAIR 120 WATT PRO COMPACT DRYER
9.99 EA.

EVENFLO BABY PRODUCTS

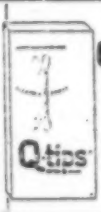


- 4 oz or 8 oz. CLEAR PLASTIC NURSER
- FORMULA NIPPLES-AMBER 3'S
- JUICE NIPPLES-ORANGE 3'S
- MILK NIPPLES-PINK 3'S
- WATER NIPPLES-BLUE 3'S

Your Choice! 3 FOR 1.00



JOHNSON'S BABY POWDER
14 oz. Size
1.28

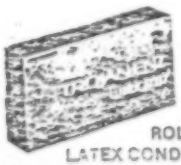


Q-TIPS COTTON SWABS
170's
59¢



THICK, SOFT CUSHIONY
SCOTT BABY FRESH WIPES
Cleans gently and thoroughly.
Package of 40
97¢

Since you've decided that both the girl and [illegible]'s are not for you, you're faced with another important decision: What method of Contraception will be best for you? If you answer Yes to these questions:



ROLLED LATEX CONDOMS
Trojan-enz Lubricated
12's 1.69



ROLLED LATEX CONDOMS
Trojan's Ribbed
12's 2.27



FAST, EFFICIENT PHOTO PROCESSING



C126-20 or C110-20 KODAK FILM
Your Choice!
1.44 EA.



SYLVANIA FLASH BAR
1.77 EA.



SYLVANIA MAGI-CUBES
PKG. OF 1
1.37 EA.



SYLVANIA FLIP FLASH-10
1.37 EA.

All merchandise on sale has been purchased [illegible] due to strikes and other unforseen situations we cannot guarantee their availability.

Mr. Steve Young
Ketchum Drug Company
16 East 40th Street
New York, New York 10016

Dear Mr. Young:

Pursuant to our conversation regarding the mailing of unsolicited materials, enclosed is a copy of 39 USC 3001(e). If I can be of additional assistance to you, please feel free to contact me at P.O. Box 1184, Church Street Station, New York, NY 10008, telephone 264-5559.

/s/ M. Locker
M. LOCKER
Postal Inspector

Enclosure

Exhibit 2

SUPREME COURT OF THE UNITED STATES

NO. 81-1590

WILLIAM F. BOLGER ET AL. APPELLANTS

v.

YOUNGS DRUG PRODUCTS CORP.

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

May 17, 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 379435 1057

Motion to Dismiss or Affirm

No. 81-1590

Office-Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM F. BOLGER, et al.,
Appellants,

v.

YOUNGS DRUG PRODUCTS CORPORATION,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

MOTION TO AFFIRM

JEROLD S. SOLOVY
ROBERT L. GRAHAM
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ISSUE PRESENTED FOR REVIEW

Whether Title 39, Section 3001(e)(2) of the United States Code, which establishes an absolute prohibition against the unsolicited mailing of commercial flyers or advertisements promoting or mentioning the desirability or availability of contraceptives, is unconstitutional as applied to appellee's concededly tasteful flyers and advertisements promoting and advocating its contraceptive products?

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1590

WILLIAM F. BOLGER, et al.,

Appellants,

v.

YOUNGS DRUG PRODUCTS CORPORATION,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee Youngs Drug Products Corporation ("Youngs") respectfully requests that this Court note probable jurisdiction of this appeal, and affirm the final judgment of the district court on the ground that the decision below was so obviously correct that further review is unwarranted.

PRELIMINARY STATEMENT

Appellants seek to appeal directly to this Court from the final judgment of Judge John Garrett Penn of the United States District Court for the District of Columbia, declaring that Title 39, Section 3001(e)(2) of the United States Code, and the corresponding regulation promulgated by the Postal Service, Domestic Mail Manual, § 123.434 (collectively "the statute"), are unconstitutional as applied to the advertisements of appellee Youngs. The statute establishes an absolute prohibition against the unsolicited mailing of commercial flyers or advertisements promoting or mentioning the availability or the desirability of contraceptive products.

Youngs is a New Jersey corporation which has engaged in the sale and distribution of contraceptive products for nearly sixty years. Youngs has long advocated the need for, and the desirability of, family planning, disease control, and contraception. In cooperation with its wholesalers and retailers, Youngs sought to mail to the public information which promoted the availability and desirability of Youngs' contraceptive products. Thereafter, the appellant Postal Service advised Youngs that the Postal Service was of the view that these mailings violated the statute. As a result, Youngs brought this action, seeking a declaratory judgment and an injunction against the enforcement of the statute. Youngs claimed that the statute, both on its face and as applied, unconstitutionally infringes upon the rights of Youngs, its customers, its wholesalers and its retailers to free speech, due process, equal protection and privacy, in contravention of the First, Fifth and Ninth Amendments of the United States Constitution.

The district court found that Youngs' commercial information is "tasteful." Contrary to appellants' present suggestions that Youngs' advertisements constitute "offensive

material" (Juris. St. at 12-13),[1] the district court expressly determined that "[t]here is no dispute that the materials at issue in this case are tasteful expressions . . . . " 526 F. Supp. at 824. As the court further found: "[N]ot only are the materials not obscene, there is no suggestion that they treat the subject matter of the desirability and availability of contraceptive products in a pandering, suggestive, or graphic way." *Id.* Indeed, in the district court, appellants acknowledged that Youngs' advertisements were both tasteful and informative. See Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion For A Preliminary Injunction (hereinafter "D. Memo."), at 18, 9.

In holding the statute unconstitutional, the district court concluded that the statute was more extensive than necessary to advance the government's purported interest. Specifically, the district court determined that the statute's "absolute statutory ban" on the mailings sought to be made by Youngs violates the First Amendment. 526 F. Supp. at 826, 829. In reaching this result, the district court simply followed the recent decisions of this Court and invalidated a federal statute which had already been invalidated in part by a three-judge federal district court panel. *See Associated Students* v. *Attorney General,* 368 F. Supp. 11 (C.D. Cal. 1973).

Youngs respectfully requests that this Court note probable jurisdiction of this appeal and summarily affirm the decision of the district court, finding that Title 39, Section 3001(e)(2) of the United States Code is unconstitutional as applied to the advertisements which Youngs seeks to mail.

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[1] Citations to appellants' Jurisdictional Statement will be referred to herein as "Juris. St. at ....." Key record references have been collected for the convenience of the Court and are set forth herein in Appendix A to this Motion. The key statutes and regulations involved are set forth herein in Appendix B.

STATEMENT OF FACTS

A. The Nature of Youngs' Business.

As the uncontroverted facts of Youngs' verified complaint and affidavits establish, Youngs has long been a leader in the manufacture and sale of contraceptive products. For nearly sixty years, Youngs has distributed high quality contraceptives on a national basis. In addition to direct chain retail accounts, Youngs markets its products through chain warehouses and wholesale distributors. These distributors in turn sell the contraceptives to retail pharmacists, who then sell the products to consumers. Verified Complaint ("Comp."), ¶ 4.

In the course of its business activities, Youngs has advertised its products in trade publications and in various wide circulation magazines. The district court found, and appellants agreed below, that these advertisements are tasteful. 526 F. Supp. at 824; D. Memo. at 18. Youngs' advertisements are also educational because they advocate the need for safe and effective contraception, note the dangers of venereal disease, and emphasize the high quality of Youngs' products compared to other forms of contraception. Comp. ¶ 4. Appellants below also acknowledged that Youngs' advertisements are informative. D. Memo at 9.

Youngs attempted to enter into advertising arrangements with its wholesalers and retail pharmacy customers, requesting that they mail Youngs' advertisements and promotional pieces to consumers who had not previously requested this information. These advertisements and promotional pieces are designed to inform consumers of the type, quality, and cost of Youngs' products; to increase public awareness and knowledge of the range of

contraceptive products available in the marketplace; to communicate with past and prospective customers with respect to the range of family planning aids and techniques available to them; and to enable Youngs to engage in informative editorializing about the need for and desirability of contraceptive products, family planning, venereal disease control and contraception. Comp. ¶ 8.

B. The Enforcement of the Statute.

As the district court found, Youngs, in conjunction with its wholesalers and retail pharmacy customers, attempted to mail a drugstore circular advertising many common drug store items, including Youngs' contraceptive products. 526 F. Supp. at 825. Youngs also proposed to mail circulars devoted solely to advertising Youngs' products. App. A, ¶¶ 3-6.

Thereafter, the appellants informed Youngs and certain of its wholesale distributors that any unsolicited mailing of these advertisements would result in a violation of the statute, for which Youngs, its wholesalers and its retailers could be both civilly and criminally prosecuted. 526 F. Supp. at 825; App. A, ¶ 5. Specifically, this prosecution could subject Youngs, its wholesalers, and its retail pharmacy customers to the penalties imposed both by the statute and by a companion federal provision, 18 U.S.C. § 1461. App. B.

C. Youngs' Advertisements.

As the district court found, Youngs' advertisements may be organized into three descriptive categories. The first group consists of "informational pamphlets promoting the desirability and availability of prophylactics in gen-

eral, and Youngs' products in particular"; the second group consists of promotional materials devoted exclusively or substantially to contraceptives; and the third group consists of mailers, such as drugstore flyers, which offer for sale numerous different items, included among which are Youngs' products. 526 F. Supp. at 824. Representative examples of Youngs' advertisements are set forth in Appendix A.

D. The Decision of the District Court.

Reviewing the facts set forth above, the district court recognized that "the statute in question, by its plain language, prohibits all three types of mailings in this case." 526 F. Supp. at 826. Accordingly, the district court reached "the issue of the constitutionality of the statute as applied to these mailings, in particular, whether the absolute statutory ban on all three types of mailings violates the First Amendment." *Id.*

Applying the "step-by-step analytical framework" recently articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980) and in *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980), the district court found that "the application of the statute and the regulations to the three types of mailings involved in this case cannot withstand less-restrictive-alternate scrutiny". 526 F. Supp. at 826, 829. Determining that the statute is more extensive than necessary to serve the asserted governmental interest, the district court held that the statute's absolute ban on the three types of mailings sought to be made by Youngs violates the First Amendment. *Id.* at 829, 831.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE ADVERTISEMENTS WHICH YOUNGS SEEKS TO MAIL.

Summary affirmance of the district court's decision is warranted here. In declaring that Section 3001(e)(2) is unconstitutional, the district court simply followed the mandate of this Court's recent decisions and struck down a statute which had previously been invalidated, in part, by a federal court panel. *See Associated Students* v. *Attorney General,* 368 F. Supp. 11 (C.D. Cal. 1973). The decision by the district court is in full accord with this Court's commercial speech analysis as set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557 (1980). Further, as in this Court's decision in *Carey* v. *Population Services International,* 431 U.S. 678, 685 (1977), the district court properly invalidated an overbroad statutory scheme, which impermissibly interfered with the exercise of fundamental rights involving the "decision whether to bear or beget a child."

Protection of the speech at issue here is particularly important. Youngs' advertisements serve substantial individual and societal interests which are protected by the Constitution and are directly related to contraception—a subject that itself warrants special constitutional protection. By flatly prohibiting Youngs' advertisements, the statute substantially infringes upon fundamental constitutional guarantees of free speech, due process, equal protection and privacy. Because Section 3001(e)(2) is grossly

disproportionate to any legitimate governmental purpose, the district court correctly declared that it is unconstitutional as applied to the advertisements which Youngs seeks to mail.

A. This Court's Recent Decisions Affirm That the Statute Violates the First Amendment.

It is firmly established that the appellants must discharge their responsibility for the delivery of the United States mails consistent with the requirements of the First Amendment. *See, e.g., United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981); *Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971). Section 3001 (e)(2), both on its face and as applied, unconstitutionally prohibits the free flow of protected information through the mails.

1. Youngs' Advertisements Serve Substantial Individual Interests Warranting First Amendment Protection.

Each of Youngs' advertisements conveys constitutionally protected factual information about contraception in general and Youngs' products in particular. In a series of recent decisions, this Court has held that advertisements like Youngs', that relate factual information about proposed commercial exchanges, are within the protection of the First Amendment. As this Court noted in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), "in recent years the Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Id.* at 566 n.9. *See Virginia State Board of Pharmacy* v.

Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809, 818, 826 (1975). Thus, even if Youngs' unsolicited advertisements were pure "commercial speech" involving nothing more than a mere listing of the prices of Youngs' products, Youngs' advertisements nevertheless could not be excluded from the mails, as the statute requires.

Moreover, Youngs' advertisements not only convey important commercial information to the individual consumer, but also they provide critical data affecting the important personal decision concerning whether to use contraceptives. Indeed, even the appellants recognize that this is a "sensitive and important" subject. (Juris. St. at 13.) Because Youngs' advertisements contain information concerning the broad range of family planning aids and techniques available, they are educational in nature and set forth Youngs' editorial position in connection with a variety of important family planning topics. Under these circumstances, appellants' application of the statute to Youngs' advertisements is unconstitutional. As the court explained in *Associated Students* v. *Attorney General*, 368 F. Supp. 11, 21 (C.D. Cal. 1973) (three-judge court), in holding that Section 3001(e)(2) abridged the First Amendment rights of both potential distributors and recipients of purely educational treatises concerning contraception:

> The prohibition of unsolicited, mailed information about contraceptives or abortions denies to many persons the knowledge, otherwise lacking, necessary to enable them to make an informed decision as to whether to bear children.

The same is true here. Appellants' application of the statute to prohibit all mailing of Youngs' educational and informative advertisements substantially and impermis-

sibly interferes with Youngs' ability to communicate with its clients and the public at large on subjects of fundamental constitutional concern.

In several recent decisions, this Court has consistently held that advertisements which convey information about important fundamental interests warrant First Amendment protection. *See, e.g., Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 96 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809, 822 (1975). The *Linmark Associates* decision is particularly instructive. There, this Court overturned a city ordinance that prohibited home owners from placing "sold" signs on their property. Recognizing the potential value of such information to city residents, this Court observed:

> The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Board,* acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families.

431 U.S. at 96.

Certainly the individual decision over whether to bear children and have a family—the subject of Youngs' advertisements—is at least as important as the decision of where to live and raise a family, the subject addressed in *Linmark Associates.* As the court explained in *Associated Students* v. *Attorney General,* 366 F.Supp. 11, 22 (C.D. Cal. 1973), "birth control and abortion are topics of extreme importance to the people of this country and the world, about which there should be open discussion and dissemi-

nation of ideas." By prohibiting the dissemination of Youngs' unsolicited advertisements in the mails, the statute unconstitutionally restricts the very discussion and dissemination of fundamental ideas that the First Amendment guarantees.

2. Youngs' Advertisements Serve Substantial Societal Interests Warranting First Amendment Protection.

In addition to the private informational value of Youngs' advertisements to individual consumers, society in general has a strong interest in the free and unrestrained flow of commercial information. As this Court has recognized, "[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'" *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978), *quoting, Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). *See also National Citizens Comm. for Broadcasting* v. *FCC*, 567 F.2d 1095, 1105 (1977), *cert. denied*, 436 U.S. 926 (1978). In this case, even the appellants recognize that Youngs' advertisements are informative. D. Memo. at 9.

This Court has identified at least two fundamental societal interests that are furthered by advertisements. First, "advertising, though entirely commercial, may often carry information of import to significant issues of the day." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 364 (1977). Secondly, advertisements serve to inform the public of the nature and price of products and services, thus performing an indispensable role in the rational allocation of resources in a free market system. *Id.*

Youngs' advertisements further both of these interests by relating educational information concerning the need for contraception, the alternative types of contraception available, birth control and the control of venereal disease. Further, they convey factual information regarding the nature and price of Youngs' products and services. Youngs' advertisements involve precisely the types of societal interests that warrant First Amendment protection.

3. Youngs' Advertisements Concern Contraception—A Subject Specially Protected by the Constitution.

Youngs' advertisements are further deserving of constitutional protection because they concern an individual's decision to utilize contraception, a subject that has a special status under the Constitution. This Court has consistently recognized that advertisements relating to contraception or abortion are protected by the First, Fifth and Ninth Amendments.

The leading case acknowledging this special protection is *Carey* v. *Population Services International,* 431 U.S. 678 (1977), where this Court faced a situation remarkably analogous to the one now before this Court. In *Carey,* a New York statute prohibited the sale or advertisement of contraceptives to minors. As here, the New York statute established an absolute ban which sought "to suppress completely any information about the availability and price of contraceptives." *Id.* at 700.

This Court overturned the New York statute. In finding a violation of the First Amendment, the Court identified three reasons for its holding: "in addition to the [1] 'substantial individual and [2] societal interests' in the free flow of commercial information enumerated in *Virginia*

State Board of Pharmacy, 425 U.S. at 763-66, the information suppressed by this statute [3] 'related to activity with which, at least in some respects, the State could not interfere.'" *Carey* v. *Population Services International*, 431 U.S. 678, 700-01 (1977), *quoting*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). (Brackets added.)

Section 3001(e)(2) is similarly defective. The statute operates as an absolute bar or suppression of the free flow of information relating to the fundamental and personal decision of whether to engage in contraception. As in *Carey*, the statute bans the flow of information central to this decision. The district court properly held the statute unconstitutional.

4. Youngs' Customers Are Constitutionally Entitled to Receive Youngs' Advertisements.

Section 3001(e)(2) also abridges the First Amendment by preventing Youngs' potential customers from receiving the factual information that Youngs seeks to communicate. Where, as here, a willing speaker exists, "the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board of Pharmacy*, 425 U.S. at 756. A statute such as the one under attack, which flatly prohibits speech, simultaneously infringes the rights of the speaker to express ideas and the rights of potential recipients to receive information and ideas. As this Court recognized in *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972):

> It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive."

Accord, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Thomas* v. *Collins*, 323 U.S. 516 (1945). *See* Note, *The*

Right to Know in First Amendment Analysis, 57 Tex.L. Rev. 505 (1979). *See also Carey* v. *Population Services International*, 431 U.S. 678, 682-84 (1978).[2]

In cases involving contraception, courts have been particularly sensitive to the needs of the public to receive information concerning contraceptive products. In *Griswold* v. *Connecticut*, 381 U.S. 479 (1964), for example, this Court invalidated a law that prohibited the use of contraceptives and explained:

> The State may not, consistently with the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read. . . .

Id. at 482. *See also Associated Students* v. *Attorney General*, 368 F. Supp. 11 (C.D. Cal. 1973) (three-judge court).

5. The Asserted Governmental Interest Is Insufficient to Justify This Constitutional Intrusion.

In contrast to the substantial, fundamental interests served by Youngs' advertisements, whatever governmental interest exists can be served as effectively by a more nar-

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[2] As this Court made clear in *Carey*, Youngs has standing to assert the rights of its customers. The statute at issue operates against those who use the mails to send unsolicited contraceptive advertisements. In such cases, the party against whom the statute operates directly may raise the rights of the other party to the transaction. *See, e.g., Carey* v. *Population Services International, supra; Craig* v. *Boren*, 429 U.S. 190, 192-97 (1976). Thus, in this case, Youngs has standing to raise the fundamental rights of its customers, whose constitutional rights will be infringed if Youngs' suit fails. *Carey* v. *Population Services International, supra; Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965).

rowly tailored scheme. Although the district court determined that the government's asserted interest in protecting the privacy of individuals in the home was "substantial", 526 F. Supp. at 828, the court concluded that, as in *Central Hudson*, "this regulation of commercial speech is constitutionally impermissible because it is 'more extensive than is necessary to serve the [governmental] interest.'" *Id.* at 829, *quoting*, *Central Hudson*, 447 U.S. at 572.

The district court further agreed with this Court's analysis in *Central Hudson* that "the government here 'has not demonstrated that its interest . . . cannot be protected adequately by more limited regulation of [appellee's] commercial expression.'" 526 F. Supp. at 829, *quoting*, *Central Hudson*, 447 U.S. at 570. Accordingly, as in both *Central Hudson* and *Bigelow* v. *Virginia*, 421 U.S. 809, 834 (1975), the district court proceeded to set forth a less restrictive alternative for certain types of Youngs' advertisements.[3] This scheme provides sufficient protection of the government's asserted interest without the wholesale abridgement of the constitutional rights of Youngs and its customers which the statute creates.

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[3] The district court allowed Youngs' advertisements, such as multi-ad store circulars not solely devoted to contraceptive advertisements, to be disseminated freely without restriction. 526 F. Supp. at 829-30. With respect to advertisements devoted exclusively or substantially to contraceptive products, the district court set forth the following requirements: (1) these advertisements must be mailed in an envelope that completely obscures the contents; (2) the envelope must contain a prominent notice indicating that the enclosed material is unsolicited; (3) the envelope "must contain a prominent warning that the contents are 'promotional material for contraceptive products,'" 526 F. Supp. at 830; and (4) the envelope must also contain a notice citing the recipient to 39 U.S.C. § 3008(a), explaining that federal law allows the recipient to have his name removed from the mailing list if he so desires. *Id.*

Nevertheless, the government now contends that the statute is necessary to protect families from receiving unwanted advertisements. (Juris. St. at 12.) This professed concern represents a shift in the government's position. When this statute was initially challenged in the *Associated Students* case, the government "did not present any interest which might form the justification for this restraint on free speech." 368 F. Supp at 22. Moreover, even after receiving an adverse decision in *Associated Students,* the government failed to appeal.

The government's past indifference toward the statute, as reflected in *Associated Students,* underscores the superfluous nature of the challenged legislation. As noted above, the district court unequivocally found that Youngs' advertisements are tasteful. 526 F. Supp. at 824. Indeed, appellants acknowledged below that the advertisements are both tasteful and informative. D. Memo at 18, 9. The statute's absolute ban on the unsolicited mailing of these advertisements, however, would totally bar Youngs from mailing this constitutionally protected material.

This absolute ban is particularly unnecessary and overbroad in light of the statutory power to veto delivery of these ads enjoyed by any potential recipient of Youngs' mail. In *Rowan* v. *Post Office Department,* 397 U.S. 728 (1970), this Court upheld a federal statute, 39 U.S.C. § 4009(a) (now § 3008(a)), which affords an absolute right to an addressee to prevent receipt of any mail which the addressee, in his sole discretion, deems "erotically arousing or sexually provocative." App. B. The *Rowan* alternative has been effectively used without challenge, and provides absolute and complete protection for any recipient who may believe that Youngs' advertisements invade the privacy of his home. Additionally, as the district

court ruled and as this Court recognized in *Consolidated Edison*, any recipient of Youngs' advertisements may always "escape exposure to objectionable material simply by transferring [Youngs' advertisements] from envelope to wastebasket." 447 U.S. at 542.

The net effect of the challenged statute is to create an unnecessary layer of legislation which absolutely prohibits the mailing by Youngs of tasteful and informative material relating to a constitutionally protected subject.[4] The statute is unconstitutionally overbroad and was properly struck down by the district court.

6. The Public Interest Mandates That the Statute Be Declared Unconstitutional.

The statute is apparently premised upon the paternalistic view that the public should be left ignorant about contraceptives and disease control, and that advertisements concerning those subjects constitute a threat to the public welfare. Indeed, the Senate report on an early ver-

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[4] Moreover, it is unclear that the statute actually succeeds in serving the asserted governmental interest. Section 3001(e)(2) permits the far more intrusive door-to-door solicitation of the proscribed material while it bans the constitutionally permissible mailing of this information. This Court has recently noted that a personal solicitation of this nature is far more intrusive than receiving information in the mail. *Consolidated Edison*, 447 U.S. at 542 n.11. Further, as interpreted by the Postal Service, the statute only prohibits people with an economic interest in the information from mailing the proscribed materials. Accordingly, any individual without an economic interest in this information could mail these advertisements, unsolicited, to the public, although Youngs is prohibited by the statute from doing so. This result cannot withstand constitutional scrutiny. As this Court recently explained in *Central Hudson*, 447 U.S. at 564, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."

sion of the statute stated that "Section 1461 of the Criminal Code was enacted to prevent the mails from being used to corrupt public morals." Sen.Rep.N. 113, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Admin. News, pp. 2210-11.

The statute thus appears to have as its primary goal the suppression and prohibition of expression concerning contraception and the prevention of venereal disease. As noted above, to withstand constitutional scrutiny as a legitimate limitation of such fundamental expression, the statute must be justified by a compelling governmental interest. As the court explained in *Community Service Broadcasting* v. *FCC*, 593 F.2d 1102 (D.C. Cir. 1978):

> The First Amendment requires that the strictest form of scrutiny be applied where the purpose of a statute is related to suppression of free expression of ideas or information. Applying such strict scrutiny the Supreme Court has held that the statute or regulation *must* be found unconstitutional unless either the speech in question is not fully protected by the First Amendment or its suppression is essential to a compelling governmental interest, as where the message being suppressed poses a clear and present danger to the national well-being.

593 F.2d at 1111 (emphasis in original, footnotes omitted), *citing, Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Cohen* v. *California*, 403 U.S. 15 (1971); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Under this standard, the statute clearly fails. The extreme remedy of the complete suppression of unsolicited contraceptive advertisements cannot be justified on the general grounds of furthering the public good. This Court has consistently held that such a paternalistic approach to the effects of advertisements cannot justify the

complete suppression of expression. *See Bigelow*, 421 U.S. at 827-28; *Virginia State Board of Pharmacy*, 425 U.S. at 769-70. Further, as the court recognized in *Associated Students* v. *Attorney General*, 368 F. Supp. 11, 22 n.3 (C.D. Cal. 1973) (three-judge court), in construing the precise statute at issue here:

> Any governmental interest in preventing the corruption of public morals cannot justify the infringement on the freedom of speech and the right to privacy that this statute entails.

Youngs' tasteful advertisements cannot be prohibited because they might be deemed offensive and embarrassing to some.[5] This Court rejected this argument in *Carey*, recognizing that such reasons "are classically not justifications validating the suppression of expression." *Carey* v. *Population Services International*, 431 U.S. 678, 701 (1977). *See also Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 210-11 (1975) (recognizing that the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer).

Finally, the district court correctly determined that "the statute and regulations go to the content of the communication . . . not to the manner of that communication . . . ." 526 F. Supp. at 831 n.12. Thus the statute cannot be sustained as a reasonable regulation of the time, place, or

---

[5] As a result of this Court's decision in *Carey* v. *Population Services International*, 431 U.S. 678 (1977), most pharmacies today carry contraceptives on open display within easy access and eye-view of all their customers.

manner of commercial speech. In construing legislation similar to that challenged here, in *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court recognized that "whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely." *Id.* at 771. In *Carey*, again faced with an analogous statute, this Court concluded that "there can be no contention that the regulation 'is a mere time, place and manner restriction.'" 431 U.S. at 700. The same is true here. By singling out speech of a particular content and prohibiting its dissemination, the statute cannot be justified as a mere time, place or manner restriction.

Based upon this Court's well-established precedent, it is apparent that the statute unlawfully prohibits protected speech.[6] Because the statute is more extensive than necessary to advance the government's purported interest, the statute violates the First Amendment.

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[6] Significantly, appellants ask this Court to indulge the government's behavioral assumptions which permeate their Jurisdictional Statement. For example, with no evidentiary support, appellants declare that the commercial information restricted by the statute "is among that least likely to play a role in important decisions consumers make" regarding contraception. (Juris. St. at 11-12 n.7.) Similarly, appellants proclaim that "it is implausible to suggest that [the prohibited advertisements are] of great significance to the people making 'private and sensitive' decisions . . . about conception." (Juris. St. at 11.) These assertions lack any support in the record and equally lack any basis in fact.

B. The Statute Impermissibly Violates The Fundamental Rights to Privacy of Youngs' Customers.

In addition to infringing upon established First Amendment rights, the statute violates the fundamental rights of privacy of Youngs potential customers by interfering with their ability to make an informed and intelligent decision regarding whether to use contraceptives and disease control devices. As this Court noted in *Carey*, "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state." 431 U.S. at 687. It is the "decision whether to bear or beget a child" that is protected by the constitutional rights of privacy established under the Fifth and Ninth Amendments. *Id. See also Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972). This protected privacy right centers on the individual's constitutional right to "independence in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977).

Governmental regulations that burden the effective exercise of an individual's right to decide to use contraceptives and disease control devices, by substantially limiting access to the means and information needed to implement that decision, can be sustained only upon a showing of a compelling state interest. As this Court noted in *Carey*:

> The same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. Both types of regulation "may be justified only by 'a compelling state interest' and must be narrowly drawn to express only the legitimate state interests at stake."

431 U.S. at 688, *quoting, Roe* v. *Wade,* 410 U.S. at 155 (footnotes omitted). Applying this standard, this Court in *Carey* held illegal New York's prohibition against the dissemination of information concerning contraceptives "because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold, Eisenstadt* v. *Baird* and *Roe* v. *Wade.*" 431 U.S. at 688-89. *See also Associated Students* v. *Attorney General,* 368 F. Supp. 11, 22 (C.D. Cal. 1973) (three-judge court).

The burden on the exercise of individual rights protected by the right to privacy is the same here as in *Carey.* The statute prohibits advertisements that bear upon a subject that is constitutionally protected, and the advertisements impart information crucial to the intelligent exercise of fundamental rights. As in *Carey,* no compelling governmental interest can be presented in support of the statute. Under these circumstances, it is apparent that the statute unconstitutionally impairs the fundamental right of privacy.

CONCLUSION

For the reasons stated herein, Youngs Drug Products Corporation respectfully requests that this Court summarily affirm the decision of the district court declaring that the statute is unconstitutional as applied to the advertisements which Youngs seeks to mail.

Respectfully submitted,

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Attorneys for Appellee
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(202) 342-3500

Dated: April 26, 1982

APPENDIX A

AFFIDAVIT

Milton J. Bryson, on oath, deposes and says:

1. I am the Marketing Director for Youngs Drug Products Corporation ("Youngs"). My office is located at 865 Centennial Avenue Piscataway, New Jersey. I have been Marketing Director for Youngs for approximately 20 years. In that capacity, I oversee a sales force of approximately 100 persons, review company policies, and direct the marketing efforts of Youngs.

2. Youngs is a New Jersey corporation engaged in the manufacture and sale of contraceptive products. Among the wholesale distributors for Youngs' products is Ketchum Drug Company ("Ketchum") of New York, New York. Ketchum's customers, in turn, are retail pharmacies.

3. For the last several years, Youngs has engaged in business discussions with Ketchum concerning the distribution of advertisements and flyers about Youngs' contraceptive products. In particular, Youngs would like Ketchum to distribute advertisements concerning Youngs' products on an unsolicited basis through the mail to its retail pharmacy customers. In addition, Youngs and Ketchum would like to be able to make arrangements with Ketchum's retail pharmacy customers, whereby those retail pharmacy customers would, in turn, distribute advertisements on an unsolicited basis through the mail concerning Youngs' products to their respective customers and the public.

4. An example of a circular seeking to advertise Youngs' products is appended hereto as Exhibit 1. This circular, prepared under Ketchum's direction in the fall of 1979, includes advertisements about many products,

including detergent, shampoo, tooth paste, and contraceptive products manufactured by Youngs (i.e., Trojan prophylactics).

5. In October, 1979, the United States Postal Service informed Ketchum that the distribution of advertising circulars, like Exhibit 1, on an unsolicited basis would violate a federal statute. A copy of a letter to Ketchum from Postal Inspector M. Locker to that effect is appended hereto as Exhibit 2. Upon receipt of Exhibit 2, Ketchum informed Youngs that Ketchum would be forced to refrain from distributing Youngs' advertisements and promotional pieces, like Exhibit 1, to its customers.

6. Since the receipt of Exhibit 2, Ketchum and Youngs have refrained from distributing Youngs' advertisements and promotional pieces on an unsolicited basis to Ketchum's customers. Youngs, however, remains ready, willing, and able to distribute its ads to the public on an unsolicited basis. Examples of the ads which Youngs would like to distribute in this manner are appended hereto as Exhibits 3-5. In fact, within the last several months, Youngs and Ketchum have again reviewed the possibility of distributing Youngs' ads to Ketchum's customers and to the public on an unsolicited basis.

7. Due, however, to the warnings by the Postal Service (as set forth in Exhibit 2 hereto), Youngs and Ketchum have continued to refrain from mailing Youngs' ads on an unsolicited basis to this date.

/s/ *Milton Bryson*
Milton Bryson

SUBSCRIBED AND SWORN TO
before me this 19th day of
May, 1981.

/s/ *Linda A. Mischik*
Notary Public

(Notary Stamp)


PARK PLAZA PHARMACY
1773 University Avenue
Bronx, New York
583-5900
SALE STARTS TODAY! SALE ENDS IN 14 DAYS OR WHEN SUPPLIES ARE EXHAUSTED!
...GO ON A
SPRING SAVINGS
SPREE...
MARTINSON
COFFEE
RED-REG. or BLUE-FINE
1-lb Can
1.89 EA.
TIDE
DETERGENT
GIANT SIZE-49 oz.
1.48 PKG.
NOT AVAILABLE IN SUFFOLK COUNTY
Chicken of the Sea
TUNA
CHUNK WHITE-IN OIL
6½ oz. Can
77¢ EA.
COTTONELLE
Toilet Tissue
COTTONY SOFT
4 PK.
88¢ PK.
PROFESSIONAL
TEK
TOOTH
BRUSHES
ASS'T COLORS & SIZES
5 FOR 88¢
SAFETY CUSHIONED ENDS
Q-TIPS
COTTON
SWABS
FLEXIBLE STICKS
59¢
170's
2¼ oz. BOTTLE
CHARLIE
COLOGNE
7.75 VALUE
OR
3 oz. BOTTLE
JONTUE
SPRAY
7.50 VALUE
Your Choice!
5.88

Exhibit 1

HEALTH AND

Beauty Aids at BIG SAVINGS



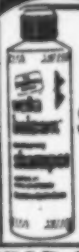
SAVE 1.70

ALBERTO VO5 HAIR SPRAY
REG. OR HARD TO HOLD
10 Oz. Plus Deposit 3 ea.
1.49 EA.
3.19 Value



SAVE 1.32

WELLA BALSAM INSTANT CONDITIONER
REG. OR EXTRA BODY
1.17 EA.
16 oz. 2.49 VALUE



WELLA BALSAM SHAMPOO
NORMAL OR OILY
1.77 EA.
3.75 VALUE

SAVE 1.98



SAVE $2.02

TONI SILKWAVE
1.77 EA.
3.79 VALUE



HEAD & SHOULDERS SHAMPOO
7 oz. Tube or 11 oz. Lotion
1.79 EA.



EFFERDENT DENTURE CLEANSER
Extra Strength 60's
1.38 EA.



EXTRA-STRENGTH TYLENOL TABLETS
60's
1.66 EA.



MENNEN SPEED STICK
REGULAR
2.5 oz.
89¢ EA.



FLICKER LADIES SAFETY SHAVER
5's
89¢ EA.



SAVE $1.26

MYLANTA ANTACID LIQUID
12 oz.
1.49 EA.
2.75 Value



AYDS REDUCING CANDY
24 ct. Chocolate or Vanilla
2.99 EA.



BUF-PUF CLEANSING SPONGE
1.49 EA.



DISPOSABLE BIC SHAVER
PKG. OF 4
44¢ EA.



TRIM NAIL CLIPS
33¢ EA.





PLAYTEX 28'S DEODORANT TAMPONS
Regular/Super Deposit Plus
1.59



30'S STAYFREE MAXI-PADS
1.88 EA.



WITH FLUORISTAN CREST TOOTHPASTE
6 oz.
79¢ EA.



MOISTURIZING NIVEA CREME
6 oz.
1.38



SCOPE MOUTH WASH
24 oz. BOTTLE
1.29

We Reserve The Right To Limit Quantities — Not Responsible For Typographical Errors


POPCORN
16 oz. Cello-Pak
88¢ BAG
WHAT-A LOT-A POPCORN
DAWN DISH DETERGENT
22 oz. BOTTLE
88¢ BTL.
13¢ OFF
DAWN
NOT AVAILABLE IN SUFFOLK CO.
YOUR CHOICE NESTLE MINIATURES
Choose Bags Of:
•Milk Chocolate
•1100,000 Bars
•Cheese-Lite Bars
•Crunch Bars
1.44 EA.
10 Trash Bags
10 DISPOSABLE TRASH BAGS
Fits 20/30 Gallon
69¢ PKG.
1.39 VALUE
SPONGE-O-MATIC SPONGE MOP
3.59 EA.
15 Tall Kitchen Garbage Bags
15 TALL KITCHEN GARBAGE BAGS
Large 44 Gl. Size
69¢ PKG.
1.39 VALUE
SAVE 1.80*
Sergeant's
SERGEANT'S FLEA & TICK COLLAR
For Small to Large Dogs, Puppies or Cats
1.49
3.29 Value!
PLASTIC TUBULAR HANGERS
8 FOR $1.00
•Yellow •White •Chocolate
NO NONSENSE COMFORT STRIDE PANTY HOSE
1.79 EA.
PLAYTEX LIVING GLOVES WITH FREE GLOVE
Living
FREE GLOVE
1.27 EA.
ORNAMENTAL AIR FRESHNER
Assorted Styles
66¢ EA.
5" PLASTIC ASHTRAYS
3 FOR $1.00
Assorted Colors
EVEREADY ALKALINE BATTERIES
AA's 4 Pk.
1.47
2.99 VALUE
9V
97¢
1.99 VALUE
10W40 DELUXE MOTOR OIL
SAFE GUARD
Deluxe
By Safeguard
49¢
Limit 1 Case Per Customer
WATERFINGERS MASSAGER by CONAIR
Reg. Price 19.99
Sam Price 13.99
Mfg's Rebate 5.00
Your Final Cost 8.99
Model # WF-1
Deluxe hand-held shower massager relaxes, massages and leaves you clean-ized. It makes a shower an experience.
SAVE $10.01*
PANASONIC LED DIGITAL AM/FM CLOCK RADIO
REG. QUAD. LIST 39.88
29.88 EA.
100% solid state circuitry, LED silent bright red display, 24-hour timer, 60-minute sleep control, 3-step brightness control, Wake to music or buzzer alarm, Model RC-86.
CONAIR 120 WATT PRO COMPACT DRYER
This dryer does not contain asbestos.
Regular Price 14.99
9.99 EA.
Powerful and compact dryer has two speeds and temperature setting. Perfect for on the go people! Model #CD80.
SAVE 45.00*



EVENFLO BABY PRODUCTS

- 4 oz or 8 oz. CLEAR PLASTIC NURSER
- FORMULA NIPPLES-AMBER 3'S
- JUICE NIPPLES-ORANGE 3'S
- MILK NIPPLES-PINK 3'S
- WATER NIPPLES-BLUE 3'S

Your Choice! 3 FOR 1.00



JOHNSON'S BABY POWDER
14 oz. Size — —
1.28



Q-TIPS COTTON SWABS
170's
59¢



THICK, SOFT CUSHIONY
SCOTT BABY FRESH WIPES
Cleans gently and thoroughly.
Package of 40
97¢

Does you've decided that both the pill and IUD's are not for you, you're faced with another important decision. What method of Contraception will be best for you? If your answer has to Some questions:



ROLLED LATEX CONDOMS
Trojan-enz Lubricated
12's 1.69



ROLLED LATEX CONDOMS
Trojan's Ribbed
12's 2.27



FAST, EFFICIENT PHOTO PROCESSING





C126-20 or C110-20 KODAK FILM
Your Choice!
1.44 EA.



SYLVANIA FLASH BAR
1.77 EA.



SYLVANIA MAGI-CUBES
1.37 EA.



SYLVANIA FLIP FLASH-10
1.37 EA.

All merchandise on sale has been purchased for sale to airlines and other unforseen circumstances, we cannot guarantee their availability.

OUR REF: ML:ed DATE: October 9, 1979

SUBJECT: CASE NO. 372-24239-

TO:

Mr. Steve Young
Ketchum Drug Company
16 East 40th Street
New York, New York 10016

Dear Mr. Young:

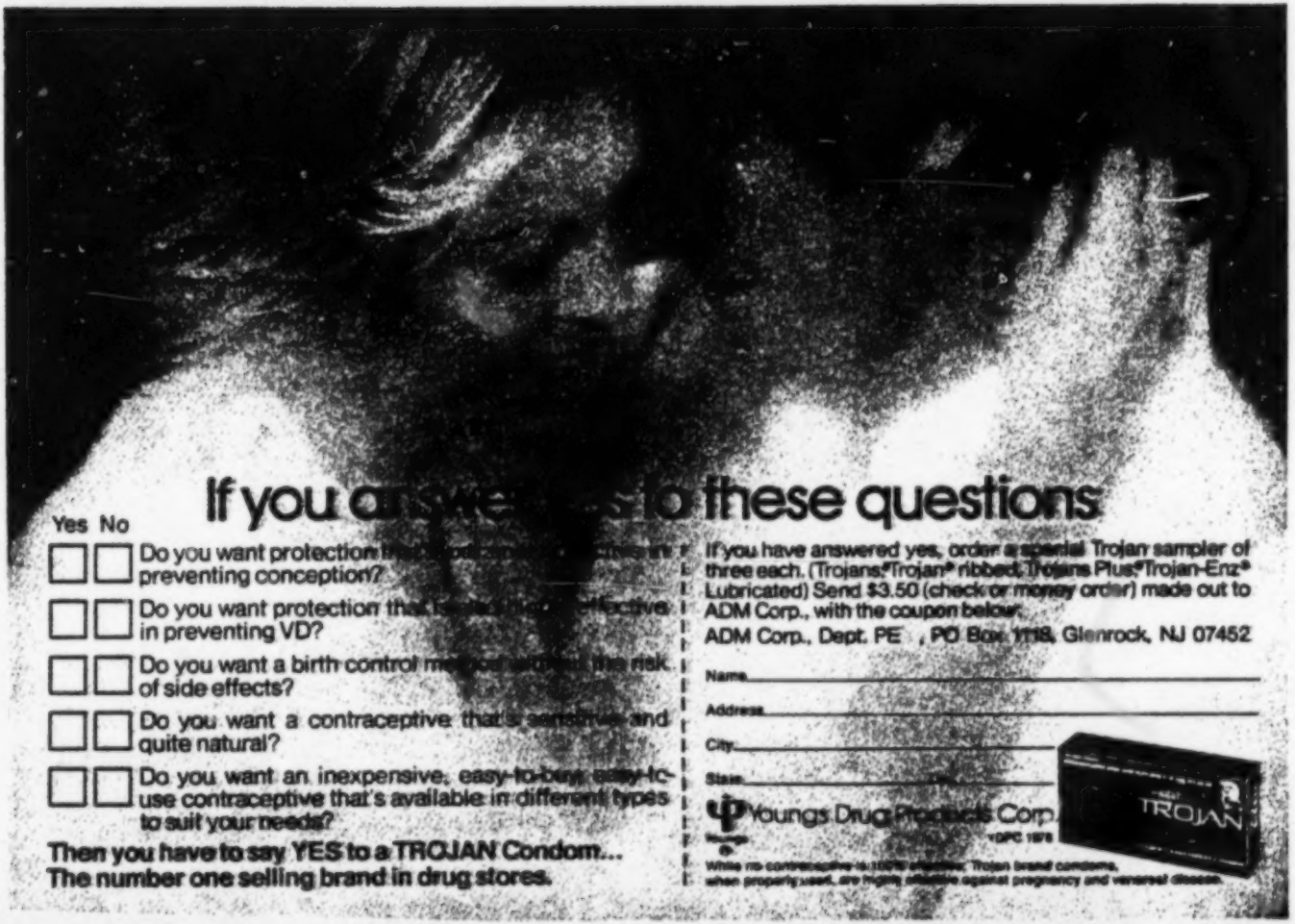
Pursuant to our conversation regarding the mailing of unsolicited materials, enclosed is a copy of 39 USC 3001(e). If I can be of additional assistance to you, please feel free to contact me at P. O. Box 1184, Church Street Station, New York, NY 10008, telephone 264-5559.

/s/ M. LOCKER
Postal Inspector

Enclosure

Exhibit 2

Exhibit 3a



App. 8

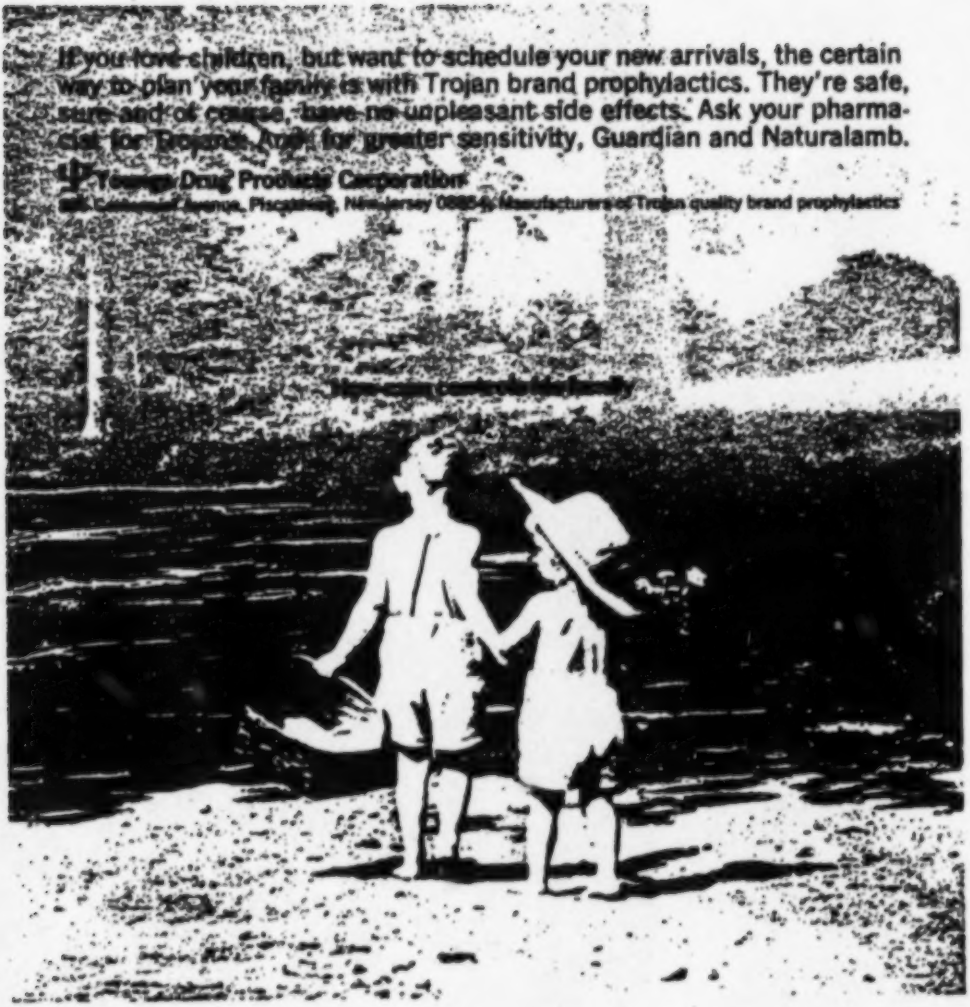

If you love children, but want to schedule your new arrivals, the certain way to plan your family is with Trojan brand prophylactics. They're safe, sure and of course, have no unpleasant side effects. Ask your pharmacist for Trojans. Ask for greater sensitivity, Guardian and Naturalamb.
Youngs Drug Products Corporation
manufacturers of Trojan quality brand prophylactics

Exhibit 3b

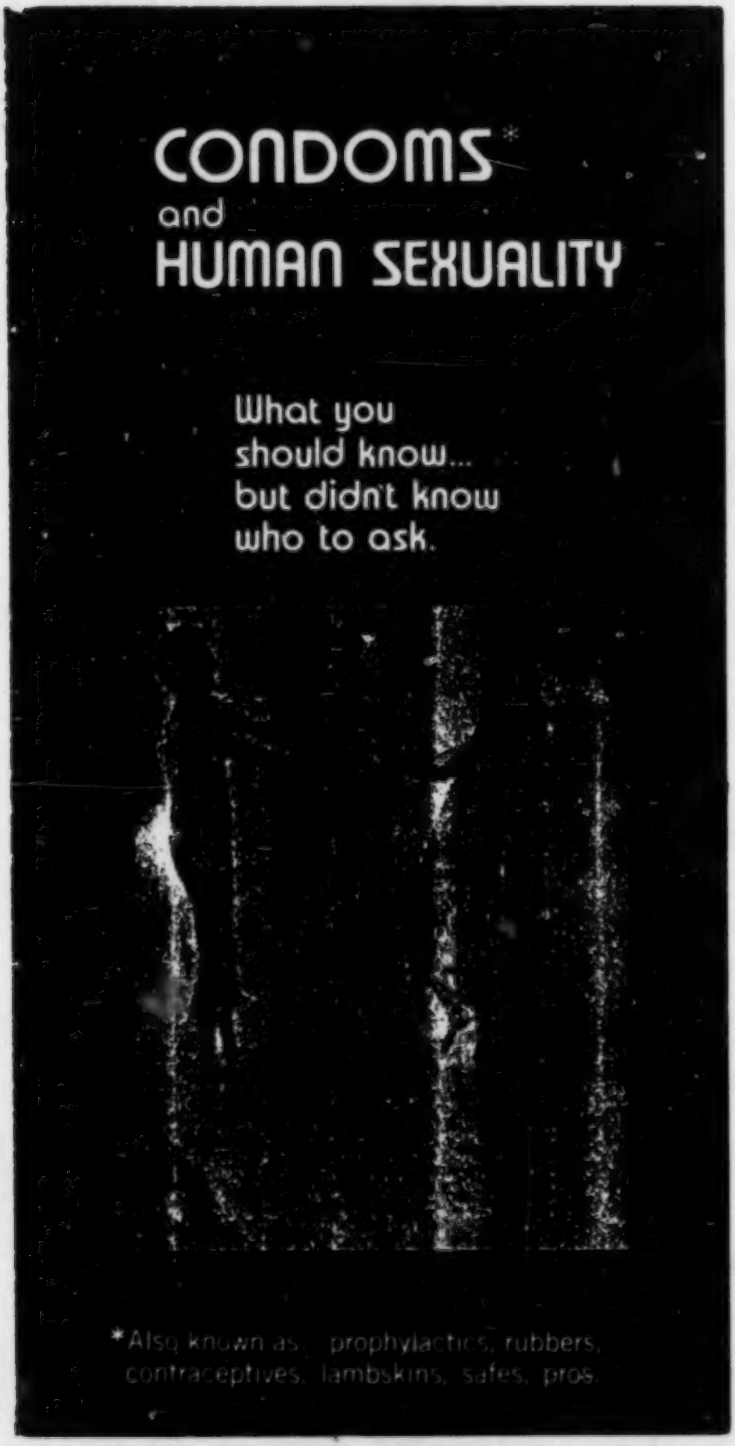
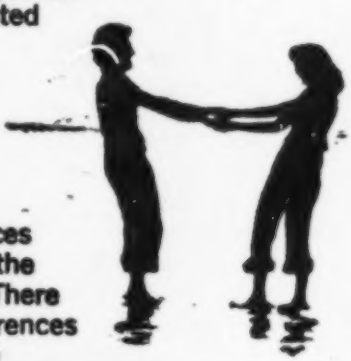

CONDOMS*
and
HUMAN SEXUALITY
What you
should know...
but didn't know
who to ask.
*Also known as... prophylactics, rubbers,
contraceptives, lambskins, safes, pros.

Exhibit 4

What is a Condom?

The condom (prophylactic) is a sheath or cover for the penis... worn during sexual intercourse to help keep the male sperm from entering the vagina and contacting the female egg. At the same time, the condom is a prophylactic since it aids in the prevention of a venereal disease being transmitted through sexual intercourse from an infected person to a non-infected person.



Is the Condom New?

No.
The condom traces its origin back to the 16th Century. There are historical references that, during the Egyptian era, condoms were made out of papyrus soaked in water and out of sheaths made from moistened linen fabric. The invention of the condom, or at least its name, has been attributed to a physician in the Court of King Charles II by the name of Dr. Condom.

What are modern Condoms made of?

Today's quality condoms are made either of natural latex (rubber) or specially processed natural membrane material (lambskin).

3

How are Condoms manufactured?

The manufacture of today's quality condoms is a modern, efficient, streamlined and quality controlled process taking place on an "assembly line" as long as a football field. While it is a rather complex process, it can basically be described as follows: Rotating glass forms, each representing an individual rubber condom, are dipped into a vat of natural latex rubber carefully compounded with other ingredients to assure continuous quality. The rotating glass form then goes through a "curing" process consisting mainly of heat and then the whole process is repeated a second time. At the end of the process the individual condoms are removed from the glass forms . . . and, in the case of TROJAN-brand condoms, are dusted with the purest and finest powders. They are then prepared for the testing process, lubrication, unit packaging and shipment.

How are Condoms tested?

TROJAN-brand rubber condoms are electronically tested by a process where each condom is put on a stainless steel form and dipped into a highly electrically charged water bath. Even the smallest holes will thus transmit the electrically charged water to the stainless steel form which will close the circuit and give indication that this condom cannot be further processed. It will automatically be rejected from the assembly line and ground into scrap.

4

Why all the talk about Condoms?

Because today, more than ever in history, the condom is playing a major role as an aid in:

- **The prevention of pregnancy**
- **The prevention of venereal and other diseases that may be transmitted sexually**

Yes! The condom, when properly used is BOTH a contraceptive and a prophylactic! Unlike other drugs, foams, pills and devices, the condom is the only contraceptive with this proven value as a prophylactic. And, most importantly, the condom performs this dual role without any dangerous side effects.



How do you properly use a Condom?

BEFORE INTERCOURSE

1. Place the condom on the penis as soon as erection occurs, prior to genital contact or penetration.
2. Pull the condom over the head of the penis. Leave about ½" space at the end. (Some condoms have small receptacle ends (enz) which provides the required space.) Squeeze end slightly to release air to avoid an air pocket.



3. Slowly unroll until entire penis has been covered.

AFTER INTERCOURSE

4. Promptly withdraw the penis before losing erection. Grasp open end of condom tightly to avoid having it slip off. During withdrawal this will prevent spillage that might transmit infection or cause pregnancy.



5. To further reduce chance of venereal disease, immediately wash the penis and surrounding area.
6. Do not use vaseline or any other oil base lubricants with latex (rubber) prophylactics.

Are Condoms helpful in preventing other unwanted complications or diseases that result from sexual activity?

Yes!

While there is still much debate, medical authorities are beginning to recognize that sexual activity may be the means of transmitting a number of diseases. Various common forms of Vaginitis (such as Trichomonas) can be transmitted sexually. There is also the scientific possibility that certain virus-caused conditions might be associated with cancer of the prostate in men and cancer of the cervix in women when these viruses (such as Herpes Simplex II) are sexually transmitted back and forth between male and female.

Does using a Condom reduce sensitivity and sexual satisfaction?

No!!!

By offering the condom user a wide choice of modern materials such as natural latex (the material used in surgeon's gloves)... natural animal membrane and various lubricants, the whole range of sensitivity requirements is satisfied. As a matter of fact, the finest condoms are thinner than a human hair... and thinness is the first step towards sensitivity. Because the use of a condom gives protection against venereal disease and pregnancy, couples using the condom are more relaxed... and sexual satisfaction may be more easily obtained.



6

WHAT ARE THE DIFFERENT TYPES OF CONDOMS AND WHAT ARE THEIR ADVANTAGES?

Natural Membrane Condoms...

Truly a different type of condom... because it is made from the most natural of materials... a lamb membrane. They have the same strength and give the same protection and assurance as rubber condoms... but because they are a natural membrane they feel better... feel more natural... and conduct more of the sensitivity than latex (rubber) condoms do. Modern lambskin condoms are lubricated and rolled for further sensitivity and convenience.

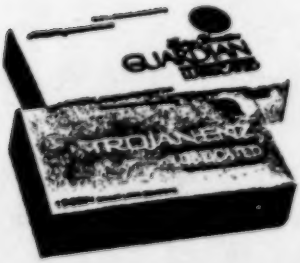


TROJAN-Brand
NATURALAMB®

are individually tested, rolled, easy to open, lubricated, natural membrane condoms.

Lubricated Rubber Condoms...
"Jelly" type

Lubricated rubber condoms offer the advantage of easier penetration and greater sensitivity than non-lubricated rubber condoms. The more commonly known "jelly" lubricant uses a surgical, non-petroleum base.



TROJAN-Brand
GUARDIAN®
(a premium lubricated product) and
TROJAN-ENZ®
LUBRICATED
are "jelly" type lubricated condoms.

7

For Her Pleasure
(which of course means more pleasure for both partners)

Specially Ribbed Condoms...
the latest in condom technology,
scientifically textured with
delicate ribs for her pleasure...
specially lubricated with a dry silicone
lubricant for the ultimate in sensitivity.



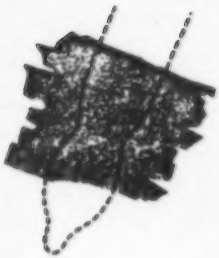
TROJAN
RIBBED
GOLDEN TRANSPARENT
CONDOMS
are specially lubricated and ribbed
for her pleasure.

Lubricated Rubber Condoms...
Special "Dry" type



GOLDEN COLORED
TROJANS *Plus*®
is a condom lubricated with
a special silicone lubricant, which
many people prefer.

8



Shaped and Colored Condoms...

Some rubber condoms have a special (body-hugging) shape to fit and feel more natural. And when pastel colored and combined with special lubricants, they offer the maximum sensitivity and satisfaction in rubber condoms.



GOLDEN COLORED TROJANS *Plus*® is a naturally shaped, specially "dry" lubricated condom.

Dry Rubber Condoms...

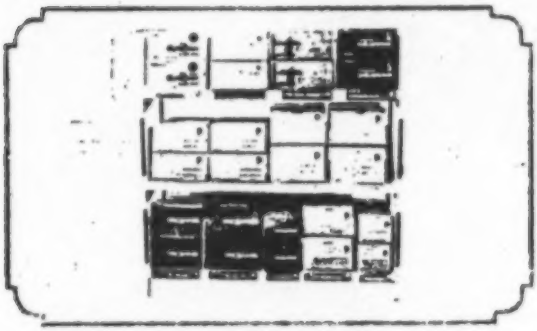


For those people who prefer a dry condom, there are basically two types... the blunt or rounded end... and those with a special receptacle (reservoir) end to provide a natural air space for extra safety.

TROJANS®
TROJAN-ENZ®
are examples of these two types of dry condoms.

Are Condoms difficult to purchase?

No!... Pharmacies throughout the United States are the traditional and best source of quality brand condoms. By virtue of his or her experience as a trained member of the community health team, the pharmacist is best able to offer a wide selection of condom types and package sizes.



More and more pharmacies today have quality brand condoms on open display to make selection and purchase easier.



10

Are Condoms expensive?

The prices of condoms, of course, vary with the type of material used and any additional features added (i.e., whether it's lubricated or not).



However, when one considers the condom from the viewpoint of its effectiveness and the absence of side effects, the cost is rather minimal.

Are Condoms easy to use?

Yes! Modern pre-rolling and air-tight, individual unit packaging make them very easy to store...open...handle...and use.

Many couples today are incorporating the placement and use of the condom into their sexual foreplay... thus adding to the mutual enjoyment of sexual intercourse.





How safe are Condoms?

Ethical manufacturers require strict standards of strength, durability and reliability in manufacturing condoms (prophylactics). Each condom must be individually tested to assure a quality condom.

What type of usage, packaging and storage conditions provide maximum assurance of continuous Condom quality?

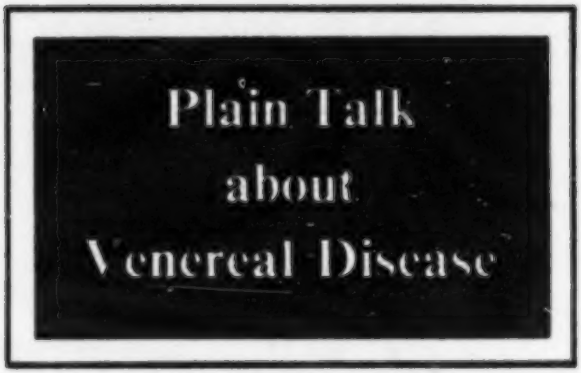
For maximum protection and assurance, make sure the condoms you purchase are:

- Individually sealed in air-tight containers
- Stored at room temperature... away from extreme heat or cold
- Used only once and then discarded

Further information about condoms may be obtained from physicians, clinics, Public Health authorities... and remember, your Community Pharmacist is the best source for information about... and the selection of... quality condoms.

PRINTED SEPTEMBER 1977


This pamphlet provided
as a public service by
YOUR COMMUNITY PHARMACY
and
YOUNGS DRUG PRODUCTS CORPORATION
Distributor of TROJAN-Brand Condoms
P.O. BOX 385, PISCATAWAY, NEW JERSEY 08854



OVER TWO AND ONE HALF MILLION VICTIMS EACH YEAR ... PREVENTION IS THE KEY TO VENEREAL DISEASE CONTROL.

©YDP Corp. 1976

Exhibit 5

WHAT IS VENEREAL DISEASE?

Venereal Disease (VD) is the general name given to those diseases caused by organisms (germs) which are transmitted from persons who already have the disease to other persons either by sexual intercourse or by close body contact involving the sex organs, mouth and/or rectum.

MUST THERE BE THIS INTIMATE SEXUAL CONTACT TO SPREAD VENEREAL DISEASE?

Yes. The organisms causing these diseases can't live very long when exposed to light and air away from warm moist areas of the human body. Thus, there is little danger of becoming infected with Syphilis or Gonorrhea from public toilets, door knobs, drinking cups or eating utensils.

IS THERE MORE THAN ONE TYPE OF VENEREAL DISEASE?

Yes, but the two most common kinds of Venereal Disease are Syphilis and Gonorrhea.

ARE THERE OTHER NAMES FOR VENEREAL DISEASE BESIDES SYPHILIS AND GONORRHEA.

Yes. Syphilis is sometimes called *pox, lues, bad blood, siff* and *old Joe*. Gonorrhea is sometimes called *clap, strain, gleet, morning drop, "a dose"* and *"the whites"*.

IS VENEREAL DISEASE ON THE INCREASE?

Yes. Venereal disease now constitutes a public health emergency of the first order . . . killing, crippling and seriousiy endangering the mental and physical well-being of millions of people.

Gonorrhea is the leading reported communicable disease in this Country and Syphilis is third. *Venereal Disease strikes someone in the United States every 12 seconds . . . 5 new victims every minute!*

WHY IS INFECTIOUS VENEREAL DISEASE INCREASING SO RAPIDLY?

The answer is complicated, but here are just some of the contributing factors:

- Many people have VD but don't recognize the symptoms.
- The contraceptive effectiveness of the "pill" has led to more frequent sexual relations without regard to the need for VD prevention.
- Lack of knowledge of what causes Venereal Disease.
- People who recognize symptoms and then get treated often fail to have all their sex contacts examined and treated.
- Casual attitude about the dangers of Venereal Disease.
- Shame and embarrassment of admitting and reporting a case of Venereal Disease.
- Failure to get prompt and proper treatment.
- Lack of funds for VD control programs.
- *People take very dangerous risks by not practicing Venereal Disease prevention such as using a quality prophylactic.*

WHO GETS VENEREAL DISEASE?

Venereal Disease can and does attack the young and old, the male and female, and people of all social classes. However, it most frequently attacks teenagers and young adults.

DOES ANY PERSON HAVE AN IMMUNITY TO VENEREAL DISEASE?

No. A person can be re-infected again and again . . . *and again!*

CAN SOMEBODY BE INFECTED WITH BOTH SYPHILIS AND GONORRHEA AT THE SAME TIME?

Yes.

HOW DANGEROUS IS VENEREAL DISEASE?

Many people die each year from untreated Syphilis. One in ten untreated victims of Syphilis will become permanently crippled heart victims. One in twelve afflicted will

develop Syphilitic insanity. One in one hundred will lose their eye sight. An overall rate of one in twenty-five of those afflicted will become in some way permanently crippled or incapacitated due to Syphilis. Untreated Gonorrhea can and does cause serious physical damage, such as sterility, heart trouble, arthritis and blindness . . . and the psychological problems that accompany these physical problems can be disabling.

CAN YOU TELL WHEN OR WHETHER ANOTHER PERSON HAS VENEREAL DISEASE?

No. There is no immediate or sudden change in general appearance and no definite pattern of symptoms to the uneducated eye.

WHAT ARE THE EARLY SYMPTOMS OR SIGNS OF SYPHILIS?

The first sign of infection is a single, painless sore where the germ has entered the body. This sore is called a Chancre (pronounced shank-er). It appears between two to six weeks after exposure to the infected person. This Chancre or sore will disappear even without treatment, but this only means that the disease has gone deeper into the body. *The disease is not cured.* The secondary stage of Syphilis which begins two to six months after the Chancre, can include skin rashes over all or part of the body, baldness, sore throat, fever and headaches. Even these will disappear without treatment, *but the disease is still in the body* . . . just waiting to create such "final" problems as crippling the nervous system, syphilitic insanity, heart disease and death.

WHAT ARE THE EARLY SYMPTOMS OR SIGNS OF GONORRHEA?

In the male, the first symptoms appear two to eight days after contact with the infected person and consist of a discharge of pus from the penis, painful inflammation in the urinary canal, which causes burning upon urination, and a frequency and urgency in urination. With females, Gonorrhea can go undetected. It may begin with a burning in the genital area, and there may or may not

be a slight vaginal discharge that could be attributed to some other routine problem. Untreated, the infection can spread into the reproductive tract. It may enter the abdomen and can cause peritonitis. After the acute infection subsides, it may be followed by a period of chronic infection which may result in sterility. Women can be infectious and be able to transmit the disease without even knowing they have it.

CAN VENEREAL DISEASE BE TRANSMITTED IN PREGNANCY TO THE UNBORN CHILD?

Gonorrhea can be transmitted to the eyes of the unborn child as it passes through the infected birth canal during delivery.

In pregnancy, transmission of the Syphilitic infection to the unborn child occurs through the infection of the mother . . . when the germs pass from the mother's blood stream into the blood stream of the unborn child. The child may be infected anytime from three months to the time of delivery. If the mother's infection is not treated in the first three months, the probability of still-birth is quadrupled . . . the possibility of infant death is almost doubled . . . and up to 80% of the remaining children suffer from congenital Syphilis depending on the duration of the mother's infection.

CAN VENEREAL DISEASE BE TREATED?

Yes! With prompt and proper diagnosis, the medical profession has available many drugs to treat Gonorrhea and Syphilis. The key to the treatment is the word, "PROMPT". Only a qualified physician can detect and treat Venereal Disease. Appropriate laboratory tests (a blood test for Syphilis and a smear or culture test for Gonorrhea) are essential in aiding the physician to detect Venereal Disease. Anyone the least bit suspicious of having Venereal Disease or suspicious of having intimate contact with a person infected with Venereal Disease should immediately contact their physician and/or Public Health Authorities.

6.

CAN VENEREAL DISEASE BE PREVENTED?

Yes!

HOW?

"When properly used, the most respected and time-proven *aid in the prevention* of Venereal Disease is the *Prophylactic* . . . also known as 'condom', 'skin', 'rubbers', 'safes', 'pros', 'etc.'."[1] Other methods of prophylaxis are thorough cleansing of the male and female sexual areas . . . douching by females and urination by males after sexual intercourse.

Of course selective sexual behavior, avoiding sexual contact with infected or possibly infected persons, is one of the best ways to prevent Venereal Disease.

IS THE PROPHYLACTIC (CONDOM) A CONTRACEPTIVE?

Yes, and has long been recognized as one of the most effective contraceptives.

WHEN AND HOW SHOULD THE CONDOM BE USED AS A PROPHYLACTIC AND/OR CONTRACEPTIVE?

For the condom to be an effective aid in the prevention of Venereal Disease or unwanted pregnancy *it must be* put on the erected penis before any sexual contact is made . . . right at the very start of any sexual activity.

DO OTHER CONTRACEPTIVE METHODS PREVENT VENEREAL DISEASE?

No! People must be made aware that other drugs, pills and devices used for contraception have no established value in preventing Venereal Disease. The prophylactic (Condom), when properly used, is the only

[1]Warren A. Ketterer, M.D., Chief, Venereal Disease Section, California State Department of Public Health.

device that is proven as *both a prophylactic and a contraceptive.*

ARE PROPHYLACTICS SAFE?

Ethical Manufacturers require strict standards of strength, durability, and reliability in manufacturing condoms. (prophylactics) Each condom must be individually tested to assure a quality condom.

WHERE ARE PROPHYLACTICS MOST EASILY OBTAINED?

Pharmacies throughout the United States have been the traditional source of quality-brand prophylactics. Unlike other distributors or vendors . . . the pharmacist, by virture of his experience and as a trained member of the community health team, is best able to offer the particular prophylactic to serve the individual need. The pharmacist "is a community leader who is trusted by the average citizen as a source of health related advice—second only to the physician."[1]

ARE PROPHYLACTICS DIFFICULT TO USE?

Absolutely not. Modern methods of producing, pre-rolling and packaging prophylactics make them very easy to open, handle and use.

DOES USING A PROPHYLACTIC REDUCE SENSITIVITY?

By offering the user a choice of modern prophylactic materials such as liquid latex (the material used in surgeons gloves) . . . natural animal membrane and special lubricants the whole range of required sensitivity levels are satisfied.

[1]Jesse L. Steinfeld, M.D., Surgeon General, Public Health Service, Department of Health, Education and Welfare.

8.

WHERE CAN FURTHER INFORMATION ON VENEREAL DISEASE BE OBTAINED?

This information is readily available from physicians, clinics and Public Health Authorities. And remember, your community pharmacist is the best source for medically-recommended products to aid in the prevention of Venereal Disease.

. . . and it is worth repeating,

VENEREAL DISEASE CAN BE PREVENTED.

"When properly used, the most respected and time-proven aid in the prevention of Venereal Disease is the Prophylactic . . . also known as 'condom', 'skin', 'rubbers', 'safes', 'pros', 'etc.'."[1] Other methods of prophylaxis are thorough cleansing of the male and female sexual areas . . . douching by females and urination by males after sexual intercourse.

Of course selective behavior, avoiding sexual contact with infected or possibly infected persons, is one of the best ways to prevent Venereal Disease.

For the condom to be an effective aid in the prevention of Venereal Disease or unwanted pregnancy it must be put on the erected penis before any sexual contact is made . . . right at the very start of any sexual activity.

Contributed as a public service by:

YOUNGS DRUG PRODUCTS CORPORATION

P.O. Box 5, Piscataway, N. J. 08854

Distributor of TROJAN® brand prophylactics

Sold in pharmacies only

Printed in U.S.A.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

39 U.S.C. § 3001(e) provides:

> (1) Any matter which is unsolicited by the addressee and which is designed, adapted, or intended for preventing conception (except unsolicited samples thereof mailed to a manufacturer thereof, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic) is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs.
>
> (2) Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement—
>
> > (A) is mailed to a manufacturer of such matter, a dealer, therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or
> >
> > (B) accompanies in the same parcel any unsolicited sample excepted by paragraph (1) of this subsection.
>
> An advertisement shall not be deemed to be unsolicited for the purposes of this paragraph if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive.

The Domestic Mail Manual, § 123.434 provides:

> Unsolicited advertisements for articles or things which are designed, adapted or intended for preventing conception are nonmailable, except when sent to a manufacturer of such articles or things, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital or clinic or when the mailer has no commercial interest in any such item.

Advertisements contained in a publication for which the addressee has paid or promised to pay a consideration, or which he has otherwise indicated he desires to receive, are not deemed unsolicited for the purposes of this section (39 U.S.C. 3001). (See 124.72.)

39 U.S.C. § 3008 provides:

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postal Service shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addresses, effective on the thirtieth calendar day after receipt of the order. The order shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postal Service believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, it shall serve upon the sender, by registered or certified mail,

a complaint stating the reasons for its belief and request that any response thereto be filed in writing with the Postal Service within 15 days after the date of such service. If the Postal Service, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, it is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punishable by the court as contempt thereof.

(f) Receipt of mail matter 30 days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postal Service shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5, relating to administrative procedure, and chapter 7, relating to judicial review, of title 5, shall not apply to any provisions of this section.

(i) For purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postal Service, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postal Service's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.

18 U.S.C. § 1461 provides:

Every obscene, lewd, lascivous, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

Reply Brief

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EVAS.

No. 81-1590

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM F. BOLGER, ET AL., APPELLANTS

v.

YOUNGS DRUG PRODUCTS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE APPELLANTS

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1981

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Appellee's defense of the district court's judgment relies in large part on the repeated assertion (*e.g.*, Mot. to Aff. 4-5, 8-10, 11-12) that its mailings are of a generally informative nature, designed to educate the public about contraception. The district court explicitly found, however, that "[i]n this case, all [the] * * * proposed mailings are commercial solicitations" (J.S. App. 7a). The district court further found that appellee's efforts to mail these "promotional materials" were prompted by its "commercial interest" (*id.* at 8a n.5), and that appellee decided to engage in these "promotional activities" because it determined that its previous "marketing strategy [was] insufficient to reach many of its potential customers" and had to be "supplement[ed]" by the mailings in issue here (*id.* at 1a). Thus the district court concluded (*id.* at 8a n.5): "[T]his is a commercial speech case with respect to all three types of proposed mailings." Appellee suggests no reason for this Court to overturn the district court's ruling on this point.

Associated Students v. *Attorney General*, 368 F. Supp. 11 (C.D. Cal. 1973) (three-judge court)—a case cited several times by appellee (see Mot. to Aff. 3, 7, 9, 10-11, 16, 19)—involved an alleged attempt to apply 39 U.S.C. 3001(e)(2) to non-commercial speech. *Associated Students* held that 39 U.S.C. 3001(e)(2) had to be interpreted to cover only commercial, not non-commercial, speech; the district court reasoned that Section 3001(e)(2) explicitly refers only to "advertisement[s]" and that constitutional difficulties would arise if Section 3001(e)(2) were extended to non-commercial speech. 368 F. Supp. at 23. As we explained in our Jurisdictional Statement, the Postal Service has accepted this interpretation of Section 3001(e)(2) and has accordingly altered its regulations to exempt from that Section's prohibition materials in which "the mailer has no commercial interest" (J.S. 3 & n. 1, 9 n.5). It is for this reason that the government did not appeal from the decision in *Associated Students*. Far from supporting appellee's position in this case, however, *Associated Students* affirmatively suggests that Section 3001(e)(2) is constitutional when properly construed as limited to commercial speech. See 368 F. Supp. at 22-24.

For these reasons and the reasons stated in the Jurisdictional Statement, it is respectfully submitted that probable jurisdiction should be noted.

REX E. LEE
Solicitor General

MAY 1982

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Appellant's Brief

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BRIEF FOR THE APPELLANTS

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QUESTION PRESENTED

Whether 39 U.S.C. 3001(e)(2), which prohibits the mailing of unsolicited advertisements for contraceptives, is unconstitutional as applied to appellee's commercial mailings.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the appellants are the United States Postal Service and William French Smith, Attorney General.

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-18a) is reported at 526 F. Supp. 823.

JURISDICTION

The order of the district court (J.S. App. 19a-20a) was entered on September 30, 1981, and a notice of appeal to this Court (J.S. App. 21a) was filed on October 30, 1981. On December 23, 1981, the Chief Justice extended the time for docketing the appeal to and including February 27, 1982, and the appeal was docketed on February 25, 1982. This Court noted

probable jurisdiction on May 17, 1982 (J.A. 47). Its jurisdiction rests on 28 U.S.C. 1252. *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981).

STATUTE AND REGULATION INVOLVED

39 U.S.C. 3001(e) provides:

> (1) Any matter which is unsolicited by the addressee and which is designed, adapted, or intended for preventing conception (except unsolicited samples thereof mailed to a manufacturer thereof, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic) is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs.
>
> (2) Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement—
>
> > (A) is mailed to a manufacturer of such matter, a dealer, therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or
> >
> > (B) accompanies in the same parcel any unsolicited sample excepted by paragraph (1) of this subsection.
>
> An advertisement shall not be deemed to be unsolicited for the purposes of this paragraph if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive.

Domestic Mail Manual Section 123.434 (July 7, 1981) provides:

> Unsolicited advertisements for articles or things which are designed, adapted or intended for preventing conception are nonmailable, except when sent to a manufacturer of such articles or things, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital or clinic, or when the mailer has no commercial interest in any such item. Advertisements contained in a publication for which the addressee has paid or promised to pay a consideration, or which he has otherwise indicated he desires to receive, are not deemed unsolicited for the purposes of this section.

STATEMENT

1. Appellee is a manufacturer and distributor of contraceptive devices. Until a few years ago, appellee's sales promotions consisted primarily of advertisements in trade publications and popular national magazines (J.S. App. 1a). Recently, following a series of "business discussions" between appellee's marketing director and a wholesaler carrying appellee's products (J.A. 14), appellee determined to supplement its traditional sales techniques by embarking on a campaign of unsolicited mass mailings to members of the public at large (J.S. App. 1a-2a).

In early 1979, the Postal Service traced an unsolicited advertisement for contraceptives to a wholesaler of appellee's products (J.S. App. 4a). It advised the wholesaler of 39 U.S.C. 3001(e)(2), which declares that an "unsolicited advertisement" of a contraceptive device "is nonmailable matter" unless it is mailed to a manufacturer, dealer, physician, pharmacist, or hospital, or is contained in a publication that the

addressee has requested.[1] Postal Service regulations, of which the wholesaler and appellee were subsequently informed, specifically exempt from this prohibition materials in which "the mailer has no commercial interest" (Domestic Mail Manual (DMM) Section 123.434 (July 7, 1981)).[2]

The Postal Service considered and rejected appellee's legal argument that Section 3001(e) could not constitutionally prohibit its proposed mailings. Appellee then brought this action, seeking declaratory and injunctive relief, in the United States District Court for the District of Columbia. Appellee offered three types of unsolicited materials as examples of the advertisements it intended to mail as part of its promotional campaign. The district court described these as "informational pamphlets promoting the desirability and availability of prophylactics in general, and [appellee's] products in particular"; "flyers exclusively or substantially devoted to promoting prophylactics in general, those made by [appellee], and/or those stocked * * * by a particular drugstore"; and "multipage, multi-item flyers * * * promoting a large variety of products * * * including prophylactics"

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[1] 39 U.S.C. 3001(e)(1) places a similar prohibition on the unsolicited mailing of contraceptive devices.

[2] The DMM, which is issued pursuant to the Postal Service's broad power to adopt regulations (39 U.S.C. 401), is incorporated by reference into 39 C.F.R. Part 111.

Postal Service regulations provide that an administrative proceeding to determine whether certain materials are mailable may be instituted before an administrative law judge or the Postal Service's Judicial Officer. See 39 C.F.R. Part 953. In addition, 18 U.S.C. 1461 makes it a crime "knowingly [to] use[] the mails for the mailing, carriage in the mails, or delivery of anything declared by * * * section 3001(e) of title 39 to be nonmailable * * *."

(J.S. App. 1a-2a).[3] Appellee asserted that Section 3001(e), as applied to its mailings, violated the First, Fifth, and Ninth Amendments (J.S. App. 5a).

2. The district court held that "all three types of proposed mailings are commercial solicitations" and that "this is a commercial speech case with respect to all three types of proposed mailings" (J.S. App. 7a, 8a n.5). The court explained that appellee's mailings are "promotional materials" in which appellee "has a commercial interest" (*id.* at 8a n.5). Accordingly, the court considered the constitutionality of Section 3001(e)(2) in light of the standards prescribed by *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980).[4]

The district court first concluded that "the government does have a substantial interest" in enforcing Section 3001(e)(2). The court identified two components of this substantial interest—the "interest in preventing such material from falling into the hands of the children of addressees who do not wish their children to be exposed to it," and the "protection of the privacy of individuals in their homes from even

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[3] Examples of these materials are reproduced at J.A. 16-19, 21-39, 42-45 and Mot. to Aff. App. 3-6, 8-29.

[4] In *Central Hudson*, this Court identified a "four-part analysis" that has been applied to restrictions on commercial speech (447 U.S. at 566; see J.S. App. 9a-10a):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

one mailing that, because of its sexual subject matter, is likely to offend some sensitive addressees" (J.S. App. 10a-11a). The district court also acknowledged that the interest in ensuring that appellee's unsolicited mailings "not fall into the hands of children whose parents do not wish them to be exposed to subject matter of a sexual nature" was "a central concern" in the case of at least some of appellee's materials (*id.* at 16a).

The district court also ruled that Section 3001(e) "*directly* advance[s]" these governmental interests and "would seem to be quite effective in dealing with the problem of unwanted mailings" (J.S. App. 11a, 12a; emphasis in original). The district court rejected appellee's argument that mailings of noncommercial materials—which are not regulated by Section 3001(e)(2)—could equally impair the government's interests, noting that "since, generally speaking, noncommercial mailers do not mail the avalanche of materials that commercial mailers do, a ban on commercially inspired mailings will go far to achieve the governmental objective involved in this case" (J.S. App. 12a; footnote omitted). In any event, the district court stated, the Constitution requires only that a restriction directly advance the government's interest, not that it be a "complete solution" (*ibid.*).

The district court nonetheless concluded that Section 3001(e)(2) violates the First Amendment "because it is 'more extensive than is necessary to serve the [governmental] interest'" (J.S. App. 12a, quoting *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 572; brackets in original). To remedy this perceived defect, the district court "devised a less restrictive alternative" (J.S. App. 17a), which it then ordered into effect

(*id.* at 19a-20a). That alternative consisted, first, of permitting "multi-item drugstore flyers containing tasteful promotion of contraceptives" to be mailed without restriction, at least so long as "the ad for contraceptives [is] * * * buried in the middle pages of the flyer" and does not "appear[] on the front page of the flyer, or by some other manner of graphic design dominate[] the rest of the flyer" (*id.* at 13a, 16a & n.10). The district court ordered that "flyers and pamphlets devoted exclusively or substantially to promoting the desirability or availability of contraceptives" would be mailable only if they satisfied certain conditions (*id.* at 15a):

> First, they must be mailed in an envelope that completely obscures from the sight of the addressee the contents. Second, the envelope must contain a prominent notice stating in capital letters that the enclosed material has not been solicited in any way by the recipient. Third, the envelope must contain a prominent warning that the contents are "promotional material for contraceptive products." Fourth, the envelope must contain a notice, in less prominent lettering than the warning and the other notice, but not in "fine print," that federal law permits the recipient to have his name removed from the mailing list of the mailer of that envelope, and citing to 39 U.S.C. § 3008(a).[5]

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[5] 39 U.S.C. 3008(a) provides:

> Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the

The district court acknowledged that its order did not fully serve all the objectives of Section 3001(e)(2). The district court pointed out that "[i]n particular, these requirements do not provide absolute protection against having material concerning contraception occasionally fall into the hands of inquisitive children" (J.S. App. 18a). But the district court declared that it was "satisfied that it has struck the balance that the Constitution mandates" (*ibid.*).

SUMMARY OF ARGUMENT

39 U.S.C. 3001(e)(2), by its terms and as interpreted by the Postal Service, applies only to commercial speech. As the district court found, all of appellee's proposed unsolicited mailings are commercial expression. This Court's decisions make it clear that Congress may regulate commercial speech if it "assert[s] a substantial interest and the interference with speech [is] in proportion to the interest

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Postal Service to refrain from further mailings of such materials to designated addresses thereof.

The constitutionality of this statute was upheld in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970). The addressee has "unreviewable discretion * * * to determine whether or not the advertisement [is] 'erotically arousing or sexually provocative'" (*id.* at 739 n.6), and his certification to that effect is final; there is no "power to make any discretionary evaluation of the material in a[ny] governmental official" (*id.* at 737). The district court appears not to have recognized, however, that the plain language of the statute, and the implementing regulations (DMM Section 123.611), require the addressee to certify that the material is erotically arousing or sexually provocative, and some addressees may be unwilling to make such a representation about advertisements of the sort in issue here. See Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 85 n.17 (1978).

served" (*In re R.M.J.*, No. 80-1431 (Jan. 25, 1982), slip op. 11). That test is satisfied here.

A. 1. Section 3001(e)(2) imposes, as most, a minimal burden on expression. Not only does it have no effect whatever on noncommercial speech—such as any mailings by organizations promoting birth control as a moral or political cause—but it reaches only those advertisements that are sent *by mail* on an *unsolicited* basis. Appellee and other advertisers therefore remain free to promote contraceptives in a wide variety of ways.

In addition, any person who wants to receive appellee's advertisements may do so; appellee need only obtain his consent. Appellee may even attempt to obtain this consent through the mails, because the Postal Service does not interpret Section 3001(e)(2) to prohibit a "pre-mailing" that, while not advertising contraceptive products, notifies recipients that such advertisements are available upon request. Section 3001(e)(2) also permits contraceptive advertisements to be placed in publications that are sent through the mails, so long as the publication itself is not unsolicited, and it permits unsolicited advertisements to be mailed to physicians, pharmacists, dealers, and others with a professional interest.

Commercial speech is protected by the First Amendment because of its value to the listener, not because of its value to the advertiser. Thus, to the extent Section 3001(e)(2) prevents appellee's advertisements from reaching unwilling recipients, it has *no* adverse effect on First Amendment rights. Because it prohibits only unsolicited mailings, Section 3001(e)(2) will have an impact on the protected rights only of those who are so uninterested in appellee's products that they have not sought information about

them—and then only on such a person's ability to receive that information in the form of unsolicited advertisements through the mails. Even as to this group, it is implausible to suppose that unsolicited mailed advertisements are of great importance to people making a decision about a personal and sensitive subject like contraception.

2. Unlike other restrictions on commercial speech that this Court has invalidated, Section 3001(e)(2) is not an attempt to influence behavior by denying information to consumers. On its face, the narrow restriction imposed by Section 3001(e)(2) is obviously not designed for this purpose. It allows information to reach any consumer who seeks it; it permits a wide range of commercial (and all noncommercial) messages to reach all consumers; and the sole category of expression it does restrict is among that least likely to play a role in a consumer's decisions on the subject of contraception. In contrast, the predecessor of Section 3001(e)(2) prohibited all mailings, commercial and noncommercial, concerning contraceptive products; Congress repealed this sweeping prohibition and replaced it with the limited regulation of Section 3001(e)(2) because it recognized (explicitly in the legislative history) that contraception is a matter of personal choice, to be left to each individual.

B. 1. Section 3001(e)(2) directly promotes the government's substantial interest in aiding parents' efforts to discuss sensitive and important subjects like birth control with their children. Congress may legitimately attempt to ensure that, if parents so desire, they—not appellee or another manufacturer promoting its wares—will introduce their children to the subject of contraception and instruct them on that

subject. As this Court has recognized, the nature and volume of unsolicited mailed advertisements make them a particularly intrusive form of communication; parents may not even know that this mail contains promotional messages for contraceptives, and Congress was entitled to conclude that even if they do know, they cannot reasonably be expected to monitor all of this mail closely to ensure that advertisements for contraceptives do not fall into their children's hands.

It is true, as appellee argued in the district court, that Section 3001(e)(2) permits noncommercial mailings about contraception and to that extent does not further the interest mentioned above. But the Constitution allows, and sometimes requires, a legislature to leave noncommercial expression unregulated in circumstances in which commercial speech can be restricted. Moreover, Congress might reasonably have concluded that because the form, content, and volume of advertisements like appellee's are dictated by the sender's commercial interests, they are more likely to interfere with parents' efforts to educate their children on a sensitive subject. Congress can properly determine that such efforts, while not isolated from the wide range of information and communication left untouched by Section 3001(e)(2), should be free from the intrusion of inappropriate "junk mail" and unwanted, commercially motivated solicitations.

2. Especially when expression intrudes on a home, as unsolicited commercial mail does, the government has a substantial interest in protecting recipients from materials they are likely to find offensive. This is particularly so when the governmental regulation reaches only commercial expression and when the regulation is, like Section 3001(e)(2), not prompted by

Congress's disagreement with a message conveyed by the advertising.

There can be little doubt that many persons find commercial, promotional messages about a matter like contraception—a matter so personal and private that it has a special constitutional status—to be offensive. Apparently, the district court and appellee believe this problem can be solved by distinguishing between "tastefui" and "tasteless" promotions; that approach presents obvious, and fatal, constitutional and practical difficulties.

C. Although the district court acknowledged the substantial governmental interests served by Section 3001(e)(2), the court invalidated the statute because it believed it had "devised" a less restrictive alternative. The principal effect of the district court's alternative scheme is to shift the burden and cost of distinguishing between willing and unwilling recipients from the advertiser to the unwilling recipient. Since, as we have said, appellee and other advertisers may use a pre-mailing to ask postal customers to request their products, the only gain from the district court's approach is that appellee will be able to make one less mailing to those customers, if any, who are interested in its advertisements but have not already requested them in some way.

Moreover, as the district court conceded, its alternative is not as effective as Section 3001(e)(2) in achieving Congress's objectives. The district court's alternative may make it more likely that contraceptive advertisements will fall into the hands of children; it may increase the offensiveness of such advertisements; and as a practical matter it will prevent unwilling recipients from cutting off advertisements until they have received at least one unwanted

mailing. Finally, the district court's alternative will probably not even be less restrictive of First Amendment rights; under that alternative, a recipient who objects to contraceptive advertisements will be forced to remove himself from the advertiser's mailing list entirely, with the result that he will be deprived of information about the advertiser's other products—precisely the sort of deprivation that the constitutional protection for commercial speech is intended to *prevent*.

More fundamentally, however, the district court erred in viewing "less restrictive alternative" analysis as an invitation to design a regulatory scheme that, in its view, struck a superior balance among the competing interests. Particularly in the area of commercial expression, the district court was not empowered to engage in this essentially legislative task.

ARGUMENT

39 U.S.C. 3001(e)(2) IS A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH

By its terms, 39 U.S.C. 3001(e)(2) applies only to "advertisements," and the Postal Service has further interpreted it not to apply where the mailer has "no commercial interest" in the materials.[6] Sec-

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[6] In *Associated Students* v. *Attorney General*, 368 F. Supp. 11 (C.D. Cal. 1973), a three-judge district court held that the prohibition on the mailing of "advertisements" in Section 3001(e)(2) could not constitutionally be "expand[ed] * * * beyond the[] commercial sense" of the term (*id.* at 24) and had to be interpreted in a way that "recognize[d] the inherent difference between commercial solicitation on one hand and informative editorializing on the other" (*id.* at 23). The Postal Service accepts this holding, and it issued DMM Section 123.434, confining Section 3001(e)(2) to advertise-

tion 3001(e)(2) therefore reaches only commercial speech—" 'expression related solely to the economic interests of the speaker and its audience' " (*In re R.M.J.*, No. 80-1431 (Jan. 25, 1982), slip op. 12 n.17, quoting *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 561 (1980)).

In addition, as the district court found, all the materials involved in this case are commercial speech. In seeking to mail its unsolicited materials promoting contraceptives, appellee's "sole purpose was to encourage members of the public to [buy its products] for * * * profit" (*In re R.M.J.*, *supra*, slip op. 12 n.17). The drugstore flyers containing advertisements for contraceptives (J.A. 16-19, 42-45) are no more than " 'speech proposing a commercial transaction' " and therefore fall within the core definition of commercial speech (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 562, quoting *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978); see, *e.g.*, *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 385 (1973); *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942)). The other promotional materials appellee proposes to mail are, as appellee acknowledges (J.A. 7), also "commercial activity" (*Ohralik* v. *Ohio State Bar Association*, *supra*, 436 U.S. at 456; *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979)); they are "primarily concerned with providing information about the characteristics and costs of goods and services" (*Village of Schaumburg* v. *Citizens for a Better Environ-*

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ments in which the mailer has a commercial interest (see page 4, *supra*), to make this interpretation clear. See Reply Memorandum for the Appellants at 2.

ment, 444 U.S. 620, 632 (1980)).[7] The fact that some of these materials take the form of "advertising that links a product to a * * * debate" over the various methods of contraception does not entitle them to the "broad constitutional protection" afforded noncommercial speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 563 n.5.[8]

Commercial speech occupies a "subordinate position in the scale of First Amendment values" and is subject to greater regulation than fully protected expression. *Ohralik* v. *Ohio State Bar Association*, *supra*, 436 U.S. at 456; see, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 n.24 (1976). Specifically, "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 563. Therefore, in deciding whether a restriction on commercial expression is valid, "a court may not escape

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[7] See *International Longshoremen's Association* v. *Allied International, Inc.*, No. 80-1663 (Apr. 20, 1982), slip op. 13-14; *Ohralik* v. *Ohio State Bar Association*, *supra*, 436 U.S. at 456, citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.").

[8] See also *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 540 (1981) (Brennan, J., concurring in the judgment) ("I have no doubt that those who seek to convey commercial messages will engage in the most imaginative of exercises to place themselves within the safe haven of noncommercial speech, while at the same time conveying their commercial message.").

the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975); see *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 502-503, 517 (1981) (plurality opinion); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 91 (1977). While the power to regulate commercial speech is greatest when the speech is deceptive or proposes an illegal transaction, the Court has made it clear that the government "retains * * * authority to regulate" other forms of commercial expression if it "assert[s] a substantial interest and the interference with speech [is] in proportion to the interest served." *In re R.M.J.*, *supra*, slip op. 11; see *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 564.

A. Section 3001(e)(2) Does Not Interfere Significantly With Free Speech

1. Section 3001(e)(2) constitutes, at most, a minimal burden on expression. Because it is limited to "advertisements" in which the sender has a "commercial interest," Section 3001(e)(2) has no effect on the activities—including the unsolicited mailings—of individuals or organizations committed to advocating birth control or family planning as a moral or political matter. Instead, Section 3001(e)(2) concerns only "solicitation for pecuniary gain" (*In re Primus*, 436 U.S. 412, 422 (1978)). The Postal Service's interpretation of Section 3001(e)(2) was issued to make this point clear (see pages 13-14 note 6, *supra*).

Moreover, even within the area of commercial advertising for contraceptives, Section 3001(e)(2) is in no

sense comparable to the state statute, invalidated in *Carey* v. *Population Services International*, 431 U.S. 678, 700-702 (1977), that sought "to suppress completely any information about the availability and price of contraceptives" (*id.* at 700). Nor does Section 3001(e)(2) resemble the regulatory measure at issue in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, which "completely ban[ned] promotional advertising by an electrical utility" (447 U.S. at 558). See also *Bates* v. *State Bar*, 433 U.S. 350, 379, 383 (1977) ("the suppression of all advertising by attorneys"; "blanket suppression"); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 771 (regulation "singles out speech of a particular content and seeks to prevent its dissemination completely"). Far from being an absolute ban, Section 3001(e)(2) does not bar any major channel of communication or require that advertising for contraceptives conform to certain narrow specifications.

Advertising that does not rely on the mails is unaffected by Section 3001(e)(2). The statute also leaves appellee free to mail its advertisements to persons who have requested them. Appellee may promote its contraceptives in newspapers and other publications that are sent through the mails to subscribers. Furthermore, appellee may use the mails, even without a request, to reach physicians, pharmacists, dealers, and others who are in the best position to buy its products in large quantities and recommend or distribute them. Thus, appellee is prevented only from engaging in mass mailings of its promotional materials to members of the general public who have not asked to receive them. Appellee does not suggest, and the district

court did not find, that the numerous alternatives to mass mailings are available only " 'in theory,' " while " 'in practice' " unsolicited mailed advertisements are the only effective means of promoting its products. See *Metromedia, Inc.* v. *City of San Diego, supra*, 453 U.S. at 516, quoting *Linmark Associates, Inc.* v. *Township of Willingboro, supra*, 431 U.S. at 93; *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 135-136 (1981) (Brennan, J., concurring). Indeed, until very recently, appellee, which has sold contraceptives for 60 years (J.A. 5), used a sales force and advertisements in national magazines exclusively (J.S. App. 1a)—apparently with considerable success—to reach potential customers.

In addition, this Court has frequently emphasized the hardiness of commercial speech. See, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission, supra*, 447 U.S. at 564 n.6; *Bates* v. *State Bar, supra*, 433 U.S. at 381. "Commercial speech, because of its importance to business profits, and because it is carefully calculated, is * * * less likely than other forms of speech to be inhibited by proper regulation." *Friedman* v. *Rogers, supra*, 440 U.S. at 10. The principle that the overbreadth doctrine generally does not apply to commercial expression (see *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, No. 80-1681 (Mar. 3, 1982), slip op. 7) rests on the premise that one who has a commercial interest in speaking is likely to do so even in ways that may appear to be prohibited by a statute. See *New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 25. A fortiori, appellee and other manufacturers and distributors of contraceptives, impelled by the profit motive, are likely to be resourceful in devising

means of reaching potential customers other than unsolicited mailings.

Finally, Section 3001(e)(2) applies only to unsolicited mailings, and therefore does not prevent any willing recipient from receiving advertisements for contraceptive products. Appellee may use any number of means—such as flyers distributed at drugstores or with its products—to obtain the necessary consent to mail its advertisements. Appellee may even use the mails in this effort; the Postal Service does not interpret Section 3001(e)(2) to prohibit a "premailing" that, while not advertising contraceptive products, notifies recipients that such advertisements are available upon request. Thus, at most, the net effect of Section 3001(e)(2) is to require appellee to conduct a single additional mailing to those consumers who are interested in appellee's advertisements but have not already requested them. Neither the district court nor appellee has suggested any reason to believe that this will be a large class.[9]

Appellee apparently would find its commercial interests better served by mass unsolicited mailings of advertisements to willing and unwilling recipients alike. But the purpose of protecting commercial expression is not to ensure that sellers will be able to select what they consider to be the optimal marketing strategy. The Court has suggested that the speech of corporate entities—even noncommercial speech on

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[9] By contrast, the cost to consumers of the ban on advertising of drug prices invalidated in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, was very substantial (see 425 U.S. at 766 n.20), probably several million dollars annually. See Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 26-28 & n.92 (1979).

matters of pressing public concern—is protected not because of its importance to the speaker but because of "its capacity for informing the public * * *." *First National Bank* v. *Bellotti*, 435 U.S. 765, 777 (1978); see *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 534 n.1 (1980). See also *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389 (1969). And the Court has stated that "[t]he First Amendment's concern for *commercial* speech is based on the *informational* function of advertising." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 563 (emphasis added); see *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, *supra*, slip op. 6 & n.8 (regulation does not offend the First Amendment if it does not "appreciably limit[a seller's] communication of information * * * to its customers"); *Metromedia, Inc.* v. *City of San Diego*, *supra*, 453 U.S. at 505-506 n.12. See also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 762-765. In other words, in the area of commercial speech the First Amendment is concerned with the likely value of the expression to the listeners, not to the advertiser.

Seen in this light, the insignificance of the burden Section 3001(e)(2) imposes on free expression becomes clear. To the extent Section 3001(e)(2) prevents appellee's advertisements from reaching unwilling recipients, it has *no* adverse effect on First Amendment values. Because it regulates only unsolicited mailings, Section 3001(e)(2) will have an impact on the protected rights only of those who are so uninterested in appellee's products that they have not sought information about them—and then only on such a person's ability to receive that information

through the mails in the form of unsolicited commercial advertisements. Moreover, to whatever extent consumers generally depend on unsolicited advertisements in deciding what to buy, it is implausible to suggest that this source of information is of great importance to people making "private and sensitive" decisions (*Carey* v. *Population Services International*, *supra*, 431 U.S. at 685) about contraception. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 763-765 (importance of prescription drug prices to consumers of prescription drugs); *Linmark Associates, Inc.* v. *Township of Willingboro*, *supra*, 431 U.S. at 93 (usefulness of "For Sale" signs to prospective home buyers). See generally *In re R.M.J.*, *supra*, slip op. 8 n.11 ("The commercial speech doctrine is itself based on certain empirical assumptions as to the benefits of advertising.").

2. It also cannot plausibly be contended that Section 3001(e)(2) is an effort to influence individuals' choices about whether to practice contraception.[10]

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[10] Even though Section 3001(e)(2) regulates unsolicited advertisements for contraceptives and not for other products, we believe it is incorrect to view Section 3001(e)(2) as a "content-based" restriction for First Amendment purposes (see generally *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 535-541). Advertising for one product or service may present different concerns from advertising for another product or service; common sense dictates that Congress and state legislatures be allowed to take account of these differences, and the Court has never suggested otherwise.

When striking down a ban on advertisements of prescription drug prices, for example (*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*), the Court did not suggest that a state would violate the Constitution if it treated advertisements for drugs differently from advertisements for automobiles or groceries, or regu-

Thus, unlike other restrictions on commercial speech that this Court has invalidated, Section 3001(e)(2) is not a "covert attempt by the State to manipulate the choices of its citizens * * * by depriving the public of the information needed to make a free choice." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission, supra*, 447 U.S. at 574-575 (Blackmun, J., concurring); see, *e.g.*, *Bates* v. *State Bar, supra*, 433 U.S. at 375; *Linmark Associates, Inc.* v. *Township of Willingboro, supra*, 431 U.S. at 94-97; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 770. This is clear from both the statute on its face and its legislative history. The narrow restriction imposed by Section 3001(e)(2) could not have been designed to influence behavior by reducing the free flow of infor-

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lated pharmacists differently from other businessmen. See 425 U.S. at 773 n.25. In analyzing regulations of professional advertising (see *In re R.M.J., supra; Ohralik* v. *Ohio State Bar Association, supra; Bates* v. *State Bar, supra*), the Court has never suggested that a state must regulate advertising by doctors or accountants in the same way as it regulates advertising by lawyers.

Indeed, a plurality of the Court recently endorsed a state's power to distinguish among categories of commercial speech on the basis of content, not because of the different regulatory problems presented but because the state simply "chose[] to value one kind of commercial speech * * * more than another" (*Metromedia, Inc.* v. *City of San Diego*, 453 U.S. at 512), even though a comparable distinction among categories of noncommercial speech would be unconstitutional (see *id.* at 574-575). We do not assert that commercial speech about contraceptives is intrinsically less valuable than other forms of commercial speech; our contention is that unsolicited mailings of contraceptive advertisements present legitimate regulatory concerns, unrelated to Congress's valuation of the content of the speech, that do not arise in connection with other unsolicited commercial mailings. See pages 24-33, *infra*.

mation; as we noted above, it permits a wide variety of commercial and noncommercial information about contraception to reach consumers, and places no restriction whatever on the ability of any consumer who wants information to receive it. The relatively small amount of expression Section 3001(e)(2) does restrict is among that least likely to play a role in the important decisions consumers make on this subject.

In addition, the legislative history of Section 3001(e)(2) shows that Congress, respecting the personal nature of decisions about contraception, deliberately chose to allow nearly all commercial and noncommercial communication about contraceptives to use the mails, regulating only unsolicited advertisements. The predecessor of Section 3001(e)(2) banned all mailings, commercial and noncommercial, concerning contraceptive products; its prohibitions applied to any "written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means [contraceptive drugs or devices] may be obtained * * * or how or by what means conception may be prevented" as well as "[e]very paper, writing, advertisement, or representation that any article * * * may, or can, be used or applied for preventing conception * * *." 18 U.S.C. (1964 ed.) 1461. In 1971, however, Congress replaced this sweeping prohibition with Section 3001(e)—a narrow regulation of unsolicited commercial advertisements alone. Act of Jan. 8, 1971, Pub. L. No. 91-662, 84 Stat. 1974. Such a step would not have been taken by a legislature that intended to influence citizens not to practice contraception.[11] In fact, the

[11] By contrast, the prohibition on contraceptive advertising that this Court invalidated in *Carey* v. *Population Services*

legislative history explains that Congress replaced the blanket prohibition with Section 3001(e) because it "[r]ecogniz[ed] that the use of contraceptive devices is a matter of individual choice for each citizen" (116 Cong. Rec. 20630 (1970) (remarks of Rep. Byrnes)), although it believed that unsolicited mailings of advertisements, except to physicians, hospitals, distributors, and the like, presented special concerns and should continue to be proscribed (see *ibid.*; S. Rep. No. 91-1472, 91st Cong., 2d Sess. 2 (1970)).

B. Section 3001(e)(2) Promotes Substantial Government Interests

As the district court recognized, Section 3001(e)(2) directly promotes the government's substantial interests in preventing families from receiving unwanted advertisements that may be offensive and that may, against parents' wishes, fall into the hands of children. Although Congress did not announce these interests in the legislative history when it enacted Section 3001(e), it is clear that Congress had such objectives in mind; it repealed all prohibitions against *solicited* mailings of contraceptive devices and advertisements for contraceptives, as well as the prohibition on unsolicited mailings to those with a professional interest in the products, while taking care not to permit unsolicited mailings to other persons.

International, supra, was part of a statute that also restricted the sale and distribution of contraceptives. See 431 U.S. at 681 n.1. See also *Population Services International* v. *Wilson*, 398 F. Supp. 321, 328 n.7 (S.D.N.Y. 1975) (three-judge court) (state legislature rejected proposal to permit certain advertising).

1. It is undeniable that the government has a substantial interest in aiding parents' efforts to discuss sensitive and important subjects such as birth control with their children. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. * * * The legislature [can] properly conclude that parents and others * * * who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). Many parents have strong moral and religious views concerning how their children should be educated about contraception and related subjects. Moreover, when sensitive subjects like contraception are involved, it is particularly important to prevent interference with the lines of communication between parents and children. See *H.L.* v. *Matheson*, 450 U.S. 398, 410 (1981), quoting *Bellotti* v. *Baird*, 443 U.S. 622, 637 (1979) ("[P]arents have an important 'guiding role' to play in the upbringing of their children * * * which presumptively includes counseling them on important decisions."). See also *New York* v. *Ferber*, *supra*, slip op. 9; *id.* at 10, citing *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) ("[T]he government's interest in the 'well-being of its youth' justifie[s] special treatment of indecent broadcasting received by adults as well as children."); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 212 (1975).

Unsolicited advertisements for contraceptives can work a "direct interference with the parental guidance that is especially appropriate in this sensitive area of child development" (*Carey* v. *Population Services International*, *supra*, 431 U.S. at 708 (Powell,

J., concurring)). Section 3001(e)(2) is an effort by Congress to ensure that if parents so desire, they—not appellee or another manufacturer engaged in an effort to promote its wares—will introduce their children to the subject of contraception and instruct them on that subject. "It is through the *family* that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality opinion) (emphasis added). The district court was plainly correct in finding that Section 3001(e)(2) directly helps "prevent[contraceptive advertisements] from falling into the hands of the children of addressees who do not wish their children to be exposed to [them]" (J.S. App. 11a). As this Court has recognized, postal customers routinely receive large amounts of unsolicited commercial mail (*Rowan* v. *Post Office Department*, 397 U.S. 728, 736 (1970)); such mail can reach "avalanche" proportions (J.S. App. 12a). Presumably, many addressees do not examine this mail immediately with care, but they also do not automatically dispose of unsolicited commercial mail without reading it at all; otherwise, advertisers would not find it worth sending. Consequently, many parents will not know that unsolicited promotional discussions of contraceptives are arriving in their homes. Even if they do know, it is unreasonably burdensome to expect parents to monitor this large volume of mail from the time it arrives at the home, and to examine every piece to determine if it must be placed beyond their children's reach.

In this respect, unsolicited commercial mail is a particularly intrusive medium. See *Metromedia, Inc.* v. *City of San Diego*, *supra*, 453 U.S. at 501, quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J.,

concurring) ("Each method of communicating * * * is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method.").[12] Unsolicited mail ordinarily arrives directly at the family's residence; unlike a drugstore display or even a billboard (see *Carey* v. *Population Services International*, *supra*, 431 U.S. at 717 (Stevens, J., concurring)), a family cannot avoid it. The Court has permitted close regulation of the broadcast media in part precisely because they "confront[] the citi-

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[12] In *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, the Court held that a state may not prohibit a utility company from including a discussion of controversial public issues as an insert in its electric bills. But there are a number of distinctions between *Consolidated Edison* and this case. In *Consolidated Edison*, the "prohibition of discussion of controversial issues [struck] at the heart of the freedom to speak" (447 U.S. at 535); by contrast, Section 3001(e)(2) regulates only commercial speech. In addition, a bill insert is unlikely to escape a recipient's notice in the way that unsolicited commercial mailings often do; a recipient will generally open an envelope containing a bill promptly and examine its contents with care.

Precisely because contraception is a "sensitive area of child development" in which "parental guidance is especially appropriate" (*Carey* v. *Population Services International*, *supra*, 431 U.S. at 708 (Powell, J., concurring)), contraceptive advertisements present a greater threat to parents' prerogative to educate their children than a utility's discussion of a controversial public issue would. Indeed, in *Consolidated Edison* the state did not advance any such justification for its restriction. (One principal justification the state did advance—that recipients would be offended by the inserts—applies with far more force to contraceptive advertisements. See page 31, *infra*.) In any event, there was no suggestion in *Consolidated Edison* that the state was willing to permit the utility to determine which customers were willing to receive inserts and to mail inserts only to them. See page 19, *supra*.

zen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder" (*FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 748); and unlike messages on those media, the arrival and availability of unsolicited mail cannot be scheduled for times when children are unlikely to be exposed to it.[13]

Appellee argued in the district court (see J.S. App. 11a-12a) that these interests cannot be advanced in support of Section 3001(e)(2) because that statute does not prevent noncommercial messages—for example, pamphlets from organizations advocating a certain position on birth control as a social or ideological matter—from reaching children. But it is plainly reasonable for Congress to determine that parents' discussions of a sensitive subject with their children, while not isolated from the wide range of information and communication left untouched by Section 3001(e)(2), should at least be free from the "unwarranted * * * intrusion" (*Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972)) of inappropriate "junk mail" and unwanted, commercially motivated, solicitations. Unlike mailings intended as a contribution to a public debate, the form and content of the advertisements regulated by Section 3001(e)(2) are dictated solely by the sender's commercial interest

[13] In addition, a regulation of the broadcast media generally prevents every listener, willing and unwilling, from hearing a message; a regulation of unsolicited mail permits any person who requests the mailings to obtain them. In this respect, regulation of unsolicited mail presents fewer First Amendment difficulties than regulation of radio or television. See Comment, *Pacifica Foundation* v. *FCC: "Filthy Words," The First Amendment and the Broadcast Media*, 78 Colum. L. Rev. 164, 174 (1978).

in selling his product. It was reasonable for Congress to conclude that such advertisements are more of a potential interference with parents' efforts to instruct their children than the economically disinterested advocacy of a social or political view. Compare *Ohralik* v. *Ohio State Bar Association*, *supra*, with *In re Primus*, *supra*. In addition, as the district court noted, commercial mailers, because of "the profit motive that fuels" them, are likely to be more persistent and aggressive and to mail in larger quantities (J.S. App. 12a, citing *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 771-772 n.24; *Bates* v. *State Bar*, *supra*, 433 U.S. at 380-381). This too suggests that commercial mailings constitute more of a potential interference with the relationship between parents and children. See also *Metromedia, Inc.* v. *City of San Diego*, *supra*, 453 U.S. at 511-512 (municipality need not regulate all speech that interferes with the objectives it seeks to promote).

Even if noncommercial mailings do impair the same interests, to the same degree, as commercial mailings, the First Amendment may require that the cost be borne in the case of speech that is entitled to full constitutional protection. The Postal Service has therefore made it clear that social and political advocacy is exempt from the prohibitions of Section 3001(e)(2). See pages 13-14 and note 6, *supra*. But this Court has always held that commercial speech is entitled to less protection than speech advocating a social or political cause. See page 15, *supra*. For essentially this reason, the Court long ago ruled that the intrusions of house-to-house solicitation would have to be suffered at the hands of a person exercising rights fully protected by the First Amendment (*Martin* v. *City of Struthers*, 319 U.S. 141 (1943))

but not when the speaker was engaged in commercial solicitation (*Breard* v. *Alexandria*, 341 U.S. 622, 641-643 (1951)).

2. The government also has a substantial interest in shielding all recipients of mail from materials that they are likely to find offensive. We recognize that this is a problematic reason for regulating expression; little would be left of the First Amendment if speech could be banned whenever some might find it offensive. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, No. 81-202 (July 2, 1982), slip op. 23-25, citing *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Cohen* v. *California*, 403 U.S. 15 (1971). But the Court has ruled that when expression enters the home, its potential offensiveness is a proper reason for regulation. See *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 541-542;[14] *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 748; *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 209; *Bigelow* v. *Virginia*, *supra*, 421 U.S. at 828; *Rowan* v. *Post Office Department*, *supra*.

Moreover, Congress should have greater freedom in regulating potentially offensive *commercial* speech, especially if—as here—there is no danger that the expression is being restricted because Congress disagrees with an implicit message it conveys. Since commercial speech is entitled to less constitutional protection, and the costs of suppression are primarily

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[14] In *Consolidated Edison*, the Court considered the potential offensiveness of a utility's bill inserts to be a permissible justification for regulation, but ruled that "the seriousness of the intrusion" (447 U.S. at 541) in that case was insufficient to justify prohibiting the inserts.

economic,[15] there is far less reason to allow a speaker to use an offensive form of communication to draw attention to its message. See *Cohen* v. *California*, *supra*, 403 U.S. at 24-26. Indeed, one of the principal reasons for permitting speakers to use offensive expression—that it allows them to express "otherwise inexpressible emotions" (*id.* at 26)—is simply inapplicable to commercial speech. For the Court to hold that the potential offensiveness of a commercial advertisement cannot justify a regulation would, therefore, be a significant expansion of the constitutional protection afforded commercial speech.

Here, as we have said, there is no basis for concluding that Congress acted out of hostility to the advocacy or practice of contraception, or that Congress intended to interfere with full public debate on the issue. Decisions about contraception are constitutionally protected because they are personal and intimate, and of particular importance to the individual (*Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977); *Griswold* v. *Connecticut*, 381 U.S. 479, 484-486 (1965)); a commercial treatment of such a private and sensitive subject may well give offense to many.[16] Furthermore, Section 3001(e)(2) regulates only expression that enters the home—in, as we have explained, a particularly intrusive fashion. The Court

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[15] See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 762-764; Jackson & Jeffries, *supra*, 65 Va. L. Rev. at 14-18.

[16] By contrast, in *Carey* v. *Population Services International, Inc.*, *supra*, the justifications for a regulation of advertising for contraceptives—an absolute ban, in that case—were "directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed." 431 U.S. at 701 n.28; see *id.* at 716-717 (Stevens, J., concurring).

has said of unsolicited mail (*Rowan* v. *Post Office Department*, *supra*, 397 U.S. at 738):

> That we are often "captives" outside the sanctuary of the home and subject to objectionable speech * * * does not mean we must be captives everywhere. * * * The asserted right of a mailer * * * stops at the outer boundary of every person's domain.

See also *Carey* v. *Brown*, 447 U.S. 455, 471 (1980). Finally, the government's interest in not subjecting citizens to offensive material is particularly strong when the government itself is being made the cause of the intrusion through a "government-created forum[]" (*Metromedia, Inc.* v. *City of San Diego*, *supra*, 453 U.S. at 514 n.19)—the Postal Service—that is normally subject to its plenary control. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*, 453 U.S. at 126-131; see *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 540 ("the special interests of a government in overseeing the use of its property"). See also *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974).

The district court, while not denying that potential offensiveness might justify regulating the mass mailing of contraceptive advertisements, dealt with the problem by explicitly limiting its holding to "tasteful" advertisements (J.S. App. 2a). The district court found that appellee's materials were tasteful, and it intimated that Section 3001(e)(2) might properly be enforced against "tasteless" advertisements (J.S. App. 14a n.8). See also Motion to Affirm 2-3.

Whether or not appellee's materials are in some sense "tasteful," the difficulties of this approach are obvious. Any attempt to distinguish between "taste-

ful" and "tasteless" advertisements would offend First Amendment values by "increas[ing] opportunities for the content-based censorship disfavored by the First Amendment" (*New York* v. *Ferber*, *supra*, slip op. 1 (O'Connor, J., concurring)). Indeed, any such distinction would almost certainly be unconstitutionally vague, a "broad invitation to subjective or discriminatory enforcement" (*Grayned* v. *City of Rockford*, 408 U.S. 104, 113 (1972); see, *e.g.*, *Coates* v. *Cincinnati*, 402 U.S. 611 (1971)).[17] For these reasons, it must be assumed that, without Section 3001(e)(2), "tasteless" as well as "tasteful" advertisements will be mailed to people who do not wish to receive them.[18] Section 3001(e)(2) thus significantly furthers the government's substantial interest in preventing offensive material from reaching unwilling recipients.

C. Section 3001(e)(2) Is No More Burdensome Than Necessary to Serve These Interests

Although the district court found that "the Government does have a substantial interest to be achieved by

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[17] Even if administrative criteria for distinguishing "tasteful" from "tasteless" advertisements could somehow be developed, they would be likely, in practice, to permit a good deal of offensive material to reach unwilling recipients.

[18] The district court also suggested (J.S. App. 17a) that advertisers will circulate only "tasteful" advertisements because they will not want to alienate customers. This is too optimistic an estimate, as this Court has noted. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 765; *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 744 n.19 (plurality opinion). Not only is miscalculating public taste one of the hazards of the advertiser's trade, but many advertisers may find it profitable to engage in practices that are distasteful to most, but that have a strong appeal to certain potential consumers.

this statute" (J.S. App. 10a), the court invalidated Section 3001(e)(2) because it believed it had "devised" a less restrictive alternative (*id.* at 17a). This alternative essentially consists of allowing advertisements for contraceptives to be mailed to homes that do not request them, if the advertisements are (i) on the inside pages of—and not graphically dominant in—a flyer that advertises other products, or (ii) enclosed in an envelope that notifies the recipient of the contents, states that they are unsolicited, and gives the recipient an opportunity to have his name removed from the sender's mailing list (*id.* at 13a-15a).

1. As we have explained, appellee and other advertisers of contraceptive products are free to use a pre-mailing to ask postal customers to solicit their advertisements. Appellee has no legitimate interest in sending unsolicited advertisements for contraceptives to unwilling recipients (see page 20, *supra*). Thus, the *only* gain from the district court's approach—the only respect in which it is even arguably less restrictive than Section 3001(e)(2)—is that instead of using a pre-mailing, appellee would be able to mail advertisements directly to people who are not sufficiently interested to request them.

This modest benefit plainly does not offset the substantial costs and risks of the district court's approach. The district court conceded (see J.S. App. 18a) that its suggested alternative is not equally effective in achieving the objectives of Section 3001(e)(2); the court acknowledged, for example, that a "prominent," explicit notice on the outside of the envelope (J.S. App. 15a) might increase the risk of advertisements falling into the hands of children (*ibid*). Such a notice might also make the mailings more offensive to many recipients.

Moreover, the principal effect of the district court's alternative is that instead of appellee's bearing the burden of conducting an additional mailing to determine who wants to receive its advertisements, unwilling recipients would bear the burden of notifying appellee or the Postal Service that they do not wish to receive them. The district court did not explain why this cost should be placed on the unwilling recipients, instead of being treated as a cost of advertising. In addition, the government would incur the costs of administering the district court's scheme. And the district court's suggestion that unwilling recipients be permitted to cut off further mailings remains less effective than Section 3001(e)(2); a recipient would, in practice, have to receive at least one offensive mailing before he could invoke the protection Section 3001(e)(2) now affords automatically.[19] See also page 7 note 5, *supra*.

Finally, under the district court's approach, an addressee who objected to contraceptive advertisements would "have his name removed from the [mailer's] mailing list" entirely (J.S. App. 15a). The result would be to deprive the recipient of information about the mailer's other products.[20] As we have explained, this is precisely the sort of deprivation that the constitutional protection for commercial speech is

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[19] See *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 748-749 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."). See also page 27 note 12, *supra*.

[20] Even if the addressee could specify that he wished not to receive contraceptive advertisements but to receive other mailings, a mailer might well find it uneconomical to maintain two mailing lists or to print two sets of flyers—one with and one without advertisements for contraceptives—so the practical effect of the notification would likely be to cut off all mailings to the objecting addressee.

designed to *prevent*. Thus not only is the district court's alternative not as effective in promoting the objectives of Section 3001(e)(2); in many circumstances, it may also be more, not less, restrictive of First Amendment freedoms.

2. The district court's approach also suffers from a more fundamental flaw. "The logic of * * * elaborate less-restrictive-alternative arguments" like the district court's "could raise insuperable barriers to the exercise of virtually all [regulatory] powers" (*United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976)) that affect First Amendment rights. The district court was explicit in viewing "least restrictive alternative" analysis as a broad invitation to duplicate the task Congress performed when it considered the problems that gave rise to Section 3001(e)(2), balanced the relevant interests, and enacted a regulatory scheme (see J.S. App. 18a). But when legislation regulating speech is challenged, it will almost always be possible to "devise" some alternative approach that is arguably less restrictive and that arguably promotes some of the government's interests almost as well as the approach Congress chose. "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down" (*Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173, 188-189 (1979) (Blackmun, J., concurring)).

This Court has made it clear that even when a regulation affects fully protected speech, a court should not, in the guise of determining whether the regulation is sufficiently precise, simply duplicate Congress's function or second-guess its regulatory approach. See *United States* v. *Robel*, 389 U.S. 258, 267-268 & n.20 (1967). There is even less justification for invali-

dating a regulation of commercial speech on the ground that the court can devise an alternative it prefers; not only is commercial speech of less intrinsic worth, but the economic interest of commercial speakers gives them an incentive to seek alternative means of communicating (see pages 18-19, *supra*), thus making the excessive breadth of a regulation less harmful.

Accordingly, in commercial speech cases, this Court has invalidated a measure because there was a "less restrictive alternative" only in certain limited circumstances. First, if a legislature (or a regulatory body) overreacts to a discrete problem by enacting an absolute prohibition on an entire category of expression, the Court has intervened. It has pointed out that the government's articulated reason does not support an absolute ban, and that the government could enact a more limited restriction without impairing its interests at all. See, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 570; *Bates* v. *State Bar*, *supra*, 433 U.S. at 372-373. See also *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981). It is appropriate for a court to intervene in such circumstances, both because of the indications that the regulation did not take sufficient account of First Amendment interests (cf. *In re R.M.J.*, *supra*, slip op. 14-15 (suggesting that the regulation might have been upheld if the record showed "a failed effort to proceed along * * * a less restrictive path"); *Bates* v. *State Bar*, *supra*, 433 U.S. at 371 ("[H]abit and tradition are not in themselves an adequate answer to a constitutional challenge.")), and because an absolute ban will prevent advertisers from exploring alternative means of communicating commercial information to consumers.

Second, the Court has insisted that a legislature use a less restrictive alternative when its regulation of

commercial speech was designed to influence behavior by suppressing information. See, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 570-571, citing *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U.S. 842 (1969); *Bates* v. *State Bar*, *supra*, 433 U.S. at 375; *Linmark Associates, Inc.* v. *Township of Willingboro*, *supra*, 431 U.S. at 96-97. The Court has explained that the less restrictive "alternative is to assume that * * * information is not in itself harmful, [and] that people will perceive their own best interests if only they are well enough informed." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 770. In other words, "less restrictive alternative" analysis is a means of enforcing the principle that " 'the fitting remedy for evil counsels is good ones' " (*Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), quoted in *Ohralik* v. *Ohio State Bar Association*, *supra*, 436 U.S. at 457; see, *e.g.*, *Bates* v. *State Bar*, *supra*, 433 U.S. at 375 ("[T]he preferred remedy is more disclosure, rather than less.")).

Section 3001(e)(2) fits neither of these patterns. It is not an absolute prohibition. It leaves open abundant alternative means for appellee and others to communicate information about their products, and appellee is free to seek new ways of advertising that are consistent with Section 3001(e). Far from being a broad legislative overreaction to a specific problem, Section 3001(e)(2) greatly narrowed a regulatory scheme Congress considered excessively restrictive. Finally, as we have said, Section 3001(e)(2) is not an effort to affect behavior by restricting the flow of information; its "justification" is based not "on the benefits of public ignorance" (*Bates* v.

State Bar, *supra*, 443 U.S. at 375) but on the potential interference with parents' efforts to educate their children, and the potential offensiveness that accompanies a particularly intrusive manner of circulating commercial advertisements about contraceptives. Thus, the government's interests cannot be promoted by providing more speech instead of less.

In sum, Section 3001(e)(2) is a narrow measure that deals in the most obvious and direct fashion with specific problems that Congress has a substantial interest in averting, and that does not violate any basic principles of the First Amendment by trying to keep the public in ignorance. The district court believed its alternative regulatory scheme struck a better balance among the competing interests, but that does not make Section 3001(e)(2) unconstitutional. See *Metromedia, Inc.* v. *City of San Diego*, *supra*, 453 U.S. at 508 (plurality opinion) ("If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.").

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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Appellee's Brief

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In the Supreme Court of the United States

October Term, 1982

WILLIAM F. BOLGER, et al.,

Appellants,

v.

YOUNGS DRUG PRODUCTS CORP.,

Appellee.

On Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Whether Title 39, Section 3001(e)(2) of the United States Code, which establishes a statutory prohibition against the unsolicited mailing by commercial organizations of material promoting or mentioning the desirability or availability of contraceptives, is unconstitutional on its face and as applied to appellee's concededly tasteful flyers, advertisements, and educational pamphlets promoting and advocating the use of contraceptive products.

PARTIES

Appellee adopts the list of parties contained in the Brief for the Appellants (Br. I), and adds that appellee, Youngs Drug Products Corp., has no parent company or subsidiaries (except wholly owned subsidiaries), and has the following affiliates: Youngs Rubber Corp., a New Jersey corporation; Holland-Rantos Co., Inc., a New Jersey corporation; and Johnson Drug Co., a Florida corporation.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1590

WILLIAM F. BOLGER, et al.,

Appellants,

v.

YOUNGS DRUG PRODUCTS CORP.,

Appellee.

On Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the district court (J.S. App. 1a-18a)[1] is reported at 526 F. Supp. 823.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions and regulations are set forth in the Appendix, *infra*.

[1] Record references are identified as follows: the Jurisdictional Statement Appendix ("J.S. App."), the Joint Appendix ("J.A."), and the Appendix to the Brief for Appellee ("App.").

STATEMENT

A. Nature of the Action

This case challenges the constitutionality of the statutory prohibition against the unsolicited mailing by commercial organizations of material promoting or discussing contraceptive products. The prohibition is imposed by Title 39, Section 3001(e)(2) of the United States Code (App. 1-2), and the corresponding regulation promulgated by the United States Postal Service in its Domestic Mail Manual, § 123.434 (App. 3) (collectively referred to as "the statute").

The appellee, Youngs Drug Products Corporation ("Youngs"), is a New Jersey corporation engaged in the sale and distribution of contraceptive products. In coordination with its wholesalers and retailers, Youngs has long advocated the need for, and the desirability of, family planning, disease control, and contraception.

In early 1979, Youngs sought to mail information to the public which promoted family planning, hygiene, prevention of venereal disease, and Youngs' contraceptive products. The appellant Postal Service reviewed this information and advised Youngs that these mailings violated the statute. Youngs then instituted this action, asserting that the statute unconstitutionally infringes upon the fundamental rights of Youngs, its customers, its wholesalers, and its retailers, in contravention of the First, Fifth, and Ninth Amendments of the United States Constitution. Youngs challenged the statute on its face and as applied to Youngs' mailings. (J.A. 8-9.)

In an order of September 30, 1981, and a memorandum opinion of October 7, 1981, the United States District Court for the District of Columbia granted Youngs' request for

a permanent injunction and ruled that the statute violates the First Amendment. In holding the statute unconstitutional as applied to the mailings, the district court specifically determined that the "absolute statutory ban" on Youngs' mailings imposed by the statute is substantially more extensive than necessary to advance the government's asserted interest in protecting the privacy of individuals in their homes. The district court accordingly determined that the statute's prohibition of Youngs' mailings violates the First Amendment. (J.S. App. 13a.)

Thereafter, the appellants directly appealed to this Court, pursuant to 28 U.S.C. § 1252. This Court noted probable jurisdiction on May 17, 1982. (J.A. 47.)[2]

B. Youngs' Flyers and Pamphlets

1. Youngs' Business Activities

The uncontroverted facts stated in Youngs' verified complaint and affidavits establish that Youngs has long been the leader in the manufacture and sale of contraceptive products. (J.A. 4-13, 14-15.) For nearly sixty years, Youngs has distributed high quality contraceptives on a national basis. In addition to direct chain retail accounts, Youngs markets its products through chain warehouses and wholesale distributors. These distributors in turn sell

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[2] After appealing the district court's judgment to this Court pursuant to 28 U.S.C. § 1252, but prior to this Court's noting probable jurisdiction, the appellants filed a second notice of appeal on November 30, 1981, to the United States Court of Appeals for the District of Columbia. Youngs moved to dismiss this second appeal on the grounds that, in light of the appellants' prior appeal to this Court, the Court of Appeals lacked appellate jurisdiction. In an Order entered on June 3, 1982, the Court of Appeals granted Youngs' motion and dismissed the second appeal for lack of jurisdiction, citing this Court's decision in *Donovan* v. *Richland County Association for Retarded Citizens*, 102 S. Ct. 713 (1982).

the contraceptives to retail pharmacists, who then sell the products to consumers. (J.A. 5, 14-15, 40-41.)

In early 1979, Youngs attempted to enter into arrangements with its wholesalers and retail pharmacy customers, requesting that they mail Youngs' advertisements and pamphlets to consumers who had not previously requested this information. (J.A. 7, 14-15, 40-41.) These materials are designed to increase public awareness and knowledge of the range of contraceptive products available in the marketplace; to communicate with past and prospective customers with respect to the range of family planning aids and techniques available to them; to enable Youngs to engage in informative editorializing about the need for and desirability of contraceptive products, family planning, venereal disease control, and contraception; and to inform consumers of the type, quality, and cost of Youngs' contraceptive products. (J.A. 7-9, 14-15, 40-41.)

2. The Tasteful and Educational Nature of Youngs' Mailings

The district court found, and appellants agreed below, that Youngs' advertisements and pamphlets are "tasteful expressions." (J.S. App. 2a.) The district court specifically determined that, "in this case, not only are the materials not obscene, there is no suggestion that they treat the subject matter of the desirability and availability of contraceptive products in a pandering, suggestive, or graphic way". (J.S. App. 2a.)[3]

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[3] In their brief before this Court, appellants now suggest—contrary to their position in the district court—that Youngs' proposed mailings are "offensive expression" or "an offensive form of communication". (Br. at 30-31, 32, 35.) Not only does this contention represent a shift in the appellants' position, but it is expressly contradicted by the district court's findings.

Youngs' advertisements and pamphlets are educational and informative. Specifically, they stress the need for safe and effective contraception, note the dangers of venereal disease, and emphasize the high quality of Youngs' products compared to other forms of contraception. (J.A. 7-9, 14-45.)

3. The Three Types of Mailings Proposed by Youngs

(a) Informational Pamphlets

Youngs' advertisements and pamphlets may be organized into three descriptive categories. (J.S. App. 1a-2a.) The first group consists of "informational pamphlets" discussing venereal disease and contraception generally and the advantages of prophylactics in particular. *Id.*[4]

As a review of this first group of materials shows, these pamphlets specifically address such questions as: what is a condom; is the condom new; what are modern condoms made of; how are condoms manufactured; are condoms helpful in preventing unwanted complications or diseases that result from sexual activity; what are the different types of condoms and what are their advantages; are condoms expensive; are condoms easy to use; how safe are condoms; what is venereal disease; is venereal disease on the increase; how dangerous is venereal disease; can venereal disease be transmitted in pregnancy to the unborn child; can venereal disease be treated; can venereal disease be prevented; when and how should the condom be used as a prophylactic and/or contraceptive; do other contraceptive methods prevent venereal disease; are prophylactics safe; and where can further information on venereal disease be obtained. (J.A. 23-39; App. 13-32.)

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[4] Youngs' informational pamphlets are entitled "Condoms and Human Sexuality" (J.A. 23-31; App. 13-24) and "Plain Talk About Venereal Disease" (J.A. 32-39; App. 25-32).

(b) Promotional Materials Devoted Substantially to Contraceptives

The second category of Youngs' advertisements involves "flyers exclusively or substantially devoted to promoting prophylactics in general, those made by Youngs, and/or those stocked (and perhaps discounted) by a particular drugstore or chain of drugstores." (J.S. App. 1a-2a.)

As a review of this second group of advertisements shows, these flyers advocate the use of prophylactic products for preventing conception, for preventing venereal disease, and for using a method of birth control without the risk of side effects. These flyers also promote Youngs' products as safe, sure, and lacking in unpleasant side effects. (J.A. 21-22; App. 21-22.)

(c) Multi-Page, Multi-Item Flyers

The third category of Youngs' advertisements involves "multi-page, multi-item flyers mailed out by a drugstore or chain and promoting a large variety of products available and perhaps on discount there, including prophylactics." (J.S. App. 2a.)

This third type includes advertisements about many products, such as detergent, shampoo, toothpaste, and contraceptive products. (J.A. 16-19; App. 7-10.) The Youngs' portion of the flyer not only includes price information, but also advocates the use of contraceptives. (J.A. 19; App. 10.) Specifically, the ad asks a series of questions concerning birth control, venereal disease, and effective contraception, asserting that a "yes" answer to these questions means that "you have to say YES to prophylactics". (J.A. 19; App. 10.)

C. The Enforcement of the Statute

As the district court found, Youngs, in conjunction with its wholesalers and retail pharmacy customers, attempted in early 1979 to mail a multi-page, multi-item flyer promoting many common drug store items, including Youngs' contraceptive products. (J.S. App. 4a-5a.) In particular, Youngs prepared a flyer in conjunction with Ketchum Drug Company of New York City, which Youngs and Ketchum planned to distribute on an unsolicited basis through the mails. (J.A. 14-19.)

In October 1979, the appellant Postal Service warned Ketchum Drug Company that the mailing violated the statute. (J.A. 14-20, 40-46.) Youngs then wrote letters to the Postal Service, expressing the view that the Postal Service could not constitutionally restrict this mailing. At that time, Youngs also furnished the Postal Service with a copy of a flyer devoted exclusively to promoting contraceptives on sale at a particular drugstore, as well as the informational pamphlets, and requested the Postal Service's legal opinion on the mailability of all these materials. In a letter of February 15, 1980, the Postal Service rejected Youngs' position that a prohibition against these mailings would be unconstitutional. As the district court found, "a reasonable reading of that letter is that it addressed all three types of mailings with respect to which there had been recent correspondence between Youngs and the Service, stating the Service's position that the mailing on an unsolicited basis of both types of flyers, as well as promotional pamphlets, would violate 39 U.S.C. § 3001(e)." (J.S. App. 5a.)

The appellants maintain that any unsolicited mailing of Youngs' multi-page, multi-item flyers, promotional materials, or informational pamphlets would result in a vio-

lation of the statute, for which Youngs, its wholesalers, and its retailers could be prosecuted both civilly and criminally. (J.S. App. 4a-5a; J.A. 7-9.) This prosecution could subject Youngs, its wholesalers, and its pharmacy retailers to the penalties imposed both by the statute and by a companion criminal provision, 18 U.S.C. § 1461. (App. 2-3.)[5]

In light of appellants' threats of prosecution, Youngs filed this action, claiming that the statute unconstitutionally violates the First, Fifth, and Ninth Amendments to the United States Constitution. During the pendency of this action, Youngs, its wholesalers, and its retailers have refrained from the unsolicited mailing of their multi-page, multi-item flyers, promotional pieces, and informational pamphlets to their customers or to the public. (J.A. 14-15; 40-41.)

D. The Decision of the District Court

Reviewing the facts set forth above, the district court determined that "the statute in question, by its plain language, prohibits all three types of mailings in this case." (J.S. App. 5a-6a.) Accordingly, the district court reached "the issue of the constitutionality of the statute as applied to these mailings, in particular, whether the absolute statutory ban on all three types of mailings violates the First Amendment." *Id.*

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[5] In pertinent part, 18 U.S.C. § 1461 provides that "[w]hoever knowingly uses the mails for the mailing . . . of anything declared by . . . section 3001(e) of title 39 to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter." (App. 2-3.)

The district court recognized that there is a "heavy presumption" against "a prior restraint of expression." (J.S. App. 6a.) The district court also acknowledged the central importance of the mails in the exercise of free speech. The court specifically held that in this case the prohibition of unsolicited mailed information about contraceptives denies to many persons the knowledge essential to making an informed and intelligent decision whether to bear children. *Id.*[6]

Despite the informative and educational nature of the pamphlets and flyers, the district court deemed all three types of mailings to be "commercial solicitations." (J.S. App. 7a.) The district court therefore considered this case to be "within the framework set forth by the Supreme Court for commercial speech cases." *Id.*

Applying the "step-by-step analytical framework" articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557 (1980), and in *Consolidated Edison Co.* v. *Public Service Commission,* 447 U.S. 530 (1980), the district court found that "the application of the statute and the regulations to the three types of mailings involved in this case cannot withstand less-restrictive-alternative scrutiny." (J.S. App. 13a.) Determining that the statutory prohibition is more

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[6] Throughout their brief, the appellants assert that "it is implausible to suppose that unsolicited mailed advertisements are of great importance to people making a decision about a personal and sensitive subject like contraception." (Br. at 10, 21.) In the district court, however, the appellants offered no evidence to support their assertion. Furthermore, this assertion has no basis in fact and overlooks this Court's prior determination in *Bigelow* v. *Virginia,* 421 U.S. 809, 822 (1975) ("Viewed in its entirety the advertisement [about abortion services] conveyed information of potential interest and value to a diverse audience . . ."). It is also contrary to the experience not only of the appellee but also of the Amici Curiae.

extensive than necessary to serve the asserted governmental interest, the district court held that the statute's absolute ban on the three types of mailings sought to be made by Youngs violates the First Amendment. (J.S. App. 13a.)

In reaching this result, the district court reasoned that the government has a "substantial interest" in protecting the privacy of individuals in their homes and that the statute directly advances this interest. (J.S. App. 10a-12a.) The district court held, however, that the governmental interest can be served by a more limited restriction on commercial speech:

> Here the effect of the statute and the regulations is that under no conditions may a commercially-interested mailer mail to the public on an unsolicited basis, any material promoting or mentioning the desirability or availability of contraceptives. The Court concludes that under the line of Supreme Court commercial speech cases . . ., the application of the statute and the regulations to the three types of mailings involved in this case cannot withstand less-restrictive-alternative scrutiny.

(J.S. App. 13a.)

The district court was not persuaded by the appellants' argument "that the statute is a reasonable restriction on the manner of Youngs' exercise of its free speech rights." (J.S. App. 18a, n.12.) On the contrary, the district court found "that the statute and the regulations go to the content of the communication—information about contraceptives—and not to the manner of that communication—unsolicited mailing of commercial information". *Id.*

Finally, in order to implement its decision, the district court entered an order allowing Youngs' multi-ad store circulars, which are not solely devoted to contraceptive advertisements, to be disseminated without restriction. (J.S. App. 13a-15a.) With respect to advertisements,

flyers or pamphlets devoted exclusively or substantially to contraceptive products, the court set forth the following requirements: (1) these must be mailed in a closed envelope; (2) the envelope must contain a prominent notice indicating that the enclosed materials are unsolicited; (3) the envelope "must contain a prominent warning that the contents are 'promotional material for contraceptive products,' "; and (4) the envelope must also contain a notice which both sites 39 U.S.C. § 3008(a) and explains that federal law allows the recipient to have his name removed from the mailing list if he so desires. (J.S. App. 15a.)

SUMMARY OF ARGUMENT

This case presents the question whether 39 U.S.C. §3001 (e)(2), which bans commercial organizations from making unsolicited mailings on the topics of contraception and venereal disease control, can withstand challenge under the First, Fifth, and Ninth Amendments. The district court held the statute unconstitutional as applied to Youngs' mailings. This ruling is correct and should be affirmed.

The appellants argue that the statute is intended to forward two substantial governmental purposes: (1) permitting parents to supervise the mail which falls into the hands of children, and (2) protecting an unwilling recipient from even a single brief exposure to a mailing which he might find offensive. The statutory language and the legislative history, however, undercut these alleged purposes. The statute by its terms restricts the content of mailings according to subject matter. As the product of the Victorian anti-vice campaign of Anthony Comstock, the statute was intended to restrict speech which Comstock viewed as immoral. The statute was not designed to further the goals asserted by the appellants.

Nor does the statute operate to serve its supposed purposes. Only one class of speakers is governed by the statute, those commercially interested in mailings relating to contraception. Other speakers may mail identical materials and thus undermine the asserted statutory goals. Only one type of speech is addressed, speech about contraception and venereal disease control. Other types of speech which are potentially offensive to a sensitive recipient are not regulated.

The appellants argue that the statutory restrictions are nonetheless permissible because only commercial speech is regulated. But the statute is not limited to mere price and product information. On the contrary, the statute purports to regulate all unsolicited mailings about contraception (educational, ideological, or promotional) when made by a commercial organization. Conversely, it permits purely commercial mailings about contraceptives, however great their affront to delicate sensibilities, by a noncommercial organization or individual.

Only a compelling governmental interest can validate a statute which is content directed and regulates fully protected speech. This Court, however, has specifically rejected the contention that preventing "offense" is a compelling interest, even in this specific context of unsolicited mailings. *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980). This Court has also rejected this contention in relation to advertising for contraceptives. *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977). The Court has held that the desire to prohibit fully protected speech because children may hear it is also not a compelling interest. *Erznoznik* v. *Jacksonville*, 442 U.S. 205 (1978). Similarly, the Court has rejected prevailing notions of morality as an adequate basis for prohibiting

speech which is necessary to informed decision-making in childbearing matters. *Carey* v. *Population Services Int'l, supra,* at 701.

The statute is an unlawful, content-based regulation which totally bans the use of the mails for unsolicited mailings by commercial organizations seeking to speak out on matters of fundamental concern. Furthermore, by limiting discussion on the subject of contraception and venereal disease control, the statute impermissibly burdens the decision-making process relating to childbearing, a process that is not only singularly personal but also constitutionally protected. The district court correctly held the statute unconstitutional as applied to Youngs' mailings.

ARGUMENT

I. 39 U.S.C. § 3001(e)(2) IS AN UNCONSTITUTIONAL REGULATION OF THE CONTENT OF PROTECTED SPEECH.

A. Section 3001(e)(2) Directly Impairs The Right To Make Informed Decisions About Contraception And Prevention Of Venereal Disease.

In America today, contraception and prevention of venereal disease are among the most significant topics of private and public discourse. Information about these subjects bears directly on the fundamental decisions of individuals and their families relating to conceiving and bearing children. *E.g., Carey* v. *Population Services Int'l,* 431 U.S. 678, 685, 687 (1977); *Eisenstadt* v. *Baird,* 405 U.S. 438, 453-54, 460, 463-65 (1972) (White, J. concurring in result); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). While frank discussion of anatomy, sexuality, conception, contraception, personal hygiene, and prophylaxis was, in prior eras, occasionally viewed as immoral, it is now recognized as important and protected speech under the First, Fifth, and Ninth Amendments of the Constitution. *Carey, supra,* at 701; *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). Access to information about these issues is essential to responsible and informed decision-making about sexual matters and protection from unwanted pregnancy or disease.

These topics are also the subject of continuing public debate concerning public mores, public health, and popula-

tion control.[7] Recent public discussion has included, for example, a cover story in a nationally circulated news magazine, *Time*, entitled "Herpes" (Aug. 2, 1982). The growing epidemic involving this incurable venereal disease is estimated to affect twenty million Americans with one-half million new cases each year. Physicians attribute the disease not only to a change in sexual values, but also to the decreased use of condoms. ("Herpes" at 62-64.)

Like the recent *Time* article, Youngs' proposed mailings also focus on venereal disease prevention. For example, Youngs' pamphlet, entitled "Plain Talk About Venereal Disease" (J.A. 32-39; App. 25-32) discusses transmission of venereal disease and how condoms work to prevent that transmission while other methods of contraception do not. The pamphlet mentions Youngs only once, on its final page: "contributed as a public service by: Youngs Drug Products Corporation . . . Distributor of TROJAN® brand prophylactics. Sold in pharmacies only." Youngs' other pamphlets and advertisements similarly address family planning, contraception, and prophylaxis.

Youngs' proposed mailings relate not only to current public health issues but also concern topics of fundamental constitutional importance. There can be no doubt that family planning and contraception are "topics of extreme importance to the people of this country and the world,

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[7] Congress, studying population growth, has determined that from 1960-1965 only one-fourth of all parents claimed to have been completely successful in preventing unwanted or unplanned pregnancies. Commission on Population Growth and the American Future, Interim Report to the President and Congress 26 (1971), *cited in Associated Students* v. *Attorney General*, 368 F. Supp. 11, 22 (C.D. Cal. 1973) (three-judge court).

about which there should be open discussion and dissemination of ideas". *Associated Students* v. *Attorney General*, 368 F. Supp. 11, 22 (C.D. Cal. 1973).

As this Court has previously recognized, the government may not burden the ability to make informed and responsible decisions about childbearing without a compelling basis for doing so. *Carey* v. *Population Services Int'l.*, 431 U.S. 678 (1977). Nevertheless, the appellants contend that all of Youngs' mailings are prohibited speech under the statute, subjecting Youngs to both the civil sanctions of the statute and to criminal punishment under 18 U.S.C. § 1461.

In *Carey*, this Court ruled that a New York statute which impaired access to information about contraceptives was unconstitutional. There, the New York statute prohibited advertising of contraceptives, distribution of contraceptives to persons under 16, and distribution of contraceptives by anyone other than a licensed pharmacist to persons over 16.[8] All aspects of the New York statute impaired the rights of adults and young people to make and effectuate responsible and informed decisions about contraception and prophylaxis. This Court held the New York statute unconstitutional, in recognition of the fact that "the decision whether or not to beget or bear a child is

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[8] Appellants argue that the ban on advertising was broader in *Carey* than in this case because the New York statute prohibited all advertising or display of contraceptives. (Br. 17.) However, New York could regulate only advertising within its authority. It could not and did not attempt to prohibit the mailing of advertising relating to contraceptives or the broadcast over radio or television of contraceptive advertisements. That there were some alternative vehicles of communication did not alter the fact that the statute burdened the free flow of information.

at the very heart of the cluster of constitutionally protected choices." *Carey*, 431 U.S. at 685.

In reaching this result, the Court ruled that governmental burdens upon the decision to have a child must be limited to those which serve a compelling interest. *Carey*, 431 U.S. at 676-677. *See Roe* v. *Wade*, 410 U.S. 113, 152 (1973); *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). *Carey* specifically rejected the argument, advanced by appellants in this case, that the fact that advertisements may give offense constitutes such a compelling interest. *Carey*, 431 U.S. at 701. *Carey* also rejected the argument that contraceptive advertising could arguably promote illicit sexual behavior and therefore that children should be "protected" from this information. Instead, the Court recognized that advertising about contraceptives is "constitutionally protected." *Id.*[9]

The statute here burdens the same fundamental decision-making process as the New York statute did in *Carey* and similarly cannot withstand the required scrutiny. The statute prohibits a single group of speakers — those commercially interested in contraceptives—from using the United States mails to send unsolicited materials on a single topic—contraception and the prevention of venereal disease. The statute could not be more clearly directed to the communicative content of fully protected speech about a topic of fundamental national and individual concern.

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[9] As a result of the decision in *Carey*, most pharmacies today carry contraceptives on open display within easy access and eye-view of all customers.

B. The Statute Regulates The Content of Communications.

The appellants contend that the statute is not a content regulation, but is aimed at securing privacy in the home and the right of parents to supervise information which their children may receive. (Br. 10-11.) The language and application of the statute contradict this assertion. Moreover, as the appellants themselves acknowledge (Br. 24), the legislative history does not support this interpretation of Congressional purpose.

1. The Statute Does Not Serve the Asserted Purposes—It Is Underinclusive.

This Court is not required to accept the government's asserted rationales for a statute if the statute is not truly calculated to forward those purposes. *Carey* v. *Brown*, 447 U.S. 455, 465 (1980). Offensiveness, like beauty, is in the eye of the beholder.[10] If advertisements which discuss contraception or talk about personal hygiene are offensive, then unsolicited advertising or pamphlets discussing menstruation, sanitary napkins, tampons, hemorrhoids, halitosis, bromidrosis, vaginal itch, douches, and feminine hygiene sprays should also be banned to avoid offense. Advertisements relating to these products and topics are not banned by the statute and are a staple of both mail and television communications. The advertisements come into

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[10] Indeed, in 1975 Youngs advertised condoms in a tasteful television commercial which stated: "The makers of condoms believe there is a time for children—the right time, when they are wanted. Trojans have helped people for over half a century to practice responsible parenthood." Viewers responded 8 to 1 in favor of retaining the commercial on television. "Some viewers were eager to complain about ads they thought more offensive, like bad-breath treatments and sinus-aid." Change of Seasons, *Time*, 48 (August 11, 1975).

American living rooms despite the fact that television is subject to more restrictive government regulation than are the mails, specifically because the broadcast media are more intrusive. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Bigelow* v. *Virginia*, 421 U.S. 809, 825 n.10 (1975).

In exempting from the prohibition other advertising related to private bodily functions, the statute discriminates on the basis of the content or subject matter of the mailer's communication. Impermissible content regulation has been found in similar circumstances when subject matter distinctions were made between: discussion of the topic of nuclear power as opposed to any other topic, *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980); labor picketing as opposed to picketing related to other issues, *Carey* v. *Brown*, 447 U.S. 455 (1980); signs advertising the sale of realty as opposed to signs advertising other items, *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977); and the display of movies that show nudity as opposed to the display of all other movies, *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

The focus of the statute on a single subject, contraception and venereal disease control, contradicts the asserted interest in avoiding offense. When the government regulates speech on the basis of its subject matter, "it slips from neutrality of time, place, and circumstances into a concern about content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972), *quoting* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 29.

In *Carey* v. *Brown*, 447 U.S. 455 (1980), this Court rejected the proposition that privacy in the home was an adequate rationale for a statute prohibiting picketing of

residences. In that case, the exemption for peaceful picketing of places of employment undercut the alleged statutory purpose:

> [T]he generalized classification which the statute draws suggests that Illinois itself has determined that residential privacy is not the transcendent objective . . . The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all non-labor picketing can be justified by reference to the State's interest in maintaining domestic tranquility.

Carey v. *Brown*, 447 U.S. at 465. *See* Stone, *Restrictions of Speech, Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 114 (1978).

Congress has denigrated the governmental interests the appellants profess by permitting inconsistencies in the statute. Here, in addition to discriminating against the content of communications, the statute permits the unsolicited mailing of the identical prohibited material, and therefore equally "offensive" material, by persons who have no commercial interest in contraceptives. Although the appellants attempt to justify this discrepancy as a legitimate distinction between commercial and non-commercial speech (Br. 13-14), the content of the speech is not distinguishable. Only the speaker is different in the two cases. Speaker distinctions undercut the stated purpose of the Act. "If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached." *Carey* v. *Brown*, 447 U.S. at 465 n.9, *quoting* Kalven, *The Concept of the Public Forum:*

Cox v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 29.[11] The statute does not forward its purported goals and therefore contradicts the appellants' argument regarding the purposes of the prohibition.

2. The Legislative History Establishes That the Statute Was Intended to Regulate the Content of Speech.

The appellants concede that "Congress did not announce" the asserted interests in privacy and protection of children "when it enacted section 3001(e)." (Br. 24.) The appellants correctly perceive that the legislative history fails to support their asserted governmental interests. Indeed, a review of that history establishes that the statute was designed to regulate the content of speech concerning contraception and venereal disease.

The legislation which imposes criminal sanctions for violations of the prohibition against mailing unsolicited advertisements of contraceptives is now contained in 18 U.S.C. § 1461. (App. 2-3)[12] The Criminal Act was first

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[11] The court below also justified this distinction by stating that the government may attack a perceived problem in incremental steps. This may be true in other contexts. However, when First Amendment interests are at stake, even the initial steps must not unnecessarily interfere with First Amendment rights. *Village of Schaumberg* v. *Citizens for Better Environment*, 444 U.S. 620, 637 (1980). In *Carey* v. *Brown*, this Court recognized that even "the most legitimate goal may not be advanced in a constitutionally impermissible manner." 447 U.S. at 464-65, 471.

[12] 39 U.S.C. § 3001(e)(2) provides in part: "Any unsolicited advertisement of matter which is designed, adapted or intended for preventing conception is nonmailable matter . . ." (App. 1.) Section 1461 imposes criminal sanctions for mailing nonmailable matter as defined in § 3001(e)(2). (App. 1.) The Postal Service Regulation exempts unsolicited advertisements for contraceptives from the definition of nonmailable matters "when the mailer has no commercial interest in any such item." Domestic Mail Manual § 123.434. (App. 3.)

enacted in 1865 at the request of the Post Office. *Manual Enterprises* v. *Day*, 370 U.S. 478, 500 (1962). The original legislation dealt primarily with obscene materials. In 1873, it was amended to include the prohibition against mailing any advertisement "giving information, directly or indirectly, where, or how, or of whom, or by what means [methods of contraception or abortion] . . . may be obtained or made . . ." The entire statute was entitled "An Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use" and was also known as the Comstock Act, ch. 258, 17 Stat. 598 (1873).

Anthony Comstock, a prominent anti-vice crusader, was the sponsor of the Act. He believed that "anything remotely touching upon sex was . . . obscene." Brown and Leech, Anthony Comstock 265-66 (1927) (*quoted in Poe* v. *Ullman*, 367 U.S. 497, 520 n.10 (Douglas, J., dissenting)). Comstock managed to lobby his Act through a lame duck Congress with less than an hour of debate. A. Gerber, *Sex, Pornography, and Justice* 91 (1965).[13]

The Comstock Act was recodified and some minor amendments were made, but until 1970 there was no significant reexamination of the statutory language.[14] The Comstock

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[13] Comstock had himself appointed administrator of the Act and personally prosecuted the early advocates of the Birth Control Movement, including Margaret Sanger. A. Gerber, *Sex, Pornography and Justice* 92 (1965). The first half of this century involved a serious world-wide battle by the proponents of the Birth Control Movement to be heard. D. Kennedy, *Birth Control in America* 136-171, 218-265 (1970).

[14] The successive restatements and amendments of the Act through 1970 may be found in Act of Mar. 4, 1909, ch. 321, 35 Stat. 1128; Act of Mar. 4, 1911, ch. 241, 36 Stat. 1339; Act of June 25, 1948, ch. 645, 62 Stat. 768; Act of June 28, 1955, ch. 190, 69 Stat. 183; Act of Aug. 28, 1958, Pub. L. No. 85-796, 74 Stat. 962; Act of Sept. 2, 1960, Pub. L. No. 86-682, 74 Stat. 654; Act of December 16, 1967, Pub. L. No. 90-206, 81 Stat. 623.

Act continued to reflect Comstock's own assumption that matters relating to contraception were immoral. As recently as 1955, a Senate Report acknowledged that "Section 1461 of the Criminal Code was enacted to prevent the mails from being used to corrupt the public morals." S. Rep. No. 113, 84th Cong., 1st Sess., 1 n., *reprinted in* 1955 U.S. Code Cong. & Ad. News 2210-2211.

In 1970, Congress reexamined the legislation. The Department of Health, Education and Welfare and the Department of Labor supported amending the Act to reflect changes in policies and practices with respect to availability of birth control information and instruction. H.R. Rep. No. 1105, 91st Cong., 2d Sess. at 3-4. The Postal Service acquiesced in some of the changes proposed because distribution of contraceptive information had by then become a "widely accepted practice" in coping with the serious world problems of hunger and overpopulation, and a revision was essential to avoid sanctions which were "unenforceable" in light of court decisions. *Id.* (Quoting the report of the Postmaster General to the Committee.)

The Postal Service still took the position, however, that, to the extent possible, the revisions should preserve the enforcement of the statute. *Id.* at 4. It was on the basis of the Postal Service's request that the amendments to the Act retained the ban on unsolicited materials. *Id.* at 2-3.[15] The effect of the changes was that "criminal sanctions

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[15] The amendments were contained in the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 745, and the Act of January 8, 1971, Pub. L. No. 91-662, 84 Stat. 1973. These amendments of the Comstock Act deleted all references contained in 18 U.S.C. § 1461 to contraception except for the application of penalties for mailing matter described in 39 U.S.C. § 3001(e); and they added Section 3001(e) of Title 39, prohibiting mailing of unsolicited articles and advertisements relating to contraception.

would continue to apply to advertisements . . . when the advertising is not solicited by the addressee." S. Rep. No. 1472, 91st Cong., 2d Sess. 2, *reprinted in* 1971 U.S. Code Cong. & Ad. News 5981, 5982. (Emphasis added.)

The appellants' assertions—that the statute reflects a congressional interest in preventing material on birth control from reaching children whose parents may wish to introduce them to the subject themselves (Br. 10-11) or in protecting prospective recipients from material they are likely to find offensive (Br. 11)—are afterthoughts supported by nothing in the legislative history.[16] The statute itself makes no distinction between adults and minors and the offensiveness of the presentation is nowhere discussed.[17] Indeed, the district court found that Youngs' materials were not obscene but were tasteful and that there was "no suggestion that they treat the subject matter of the desirability and availability of contraceptive products in a pandering, suggestive, or graphic way." (J.S. App. 2a.)

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[16] Furthermore, when the statute was initially challenged in the *Associated Students* case, these appellants "did not present any interest which might form the justification for this restraint on free speech." 368 F. Supp. at 22. Even after receiving an adverse decision in *Associated Students*, the appellants failed to appeal.

[17] The legislative purposes which the government incorrectly surmises form the basis for § 3001(e)(2) and § 1461 were in fact the rationale for 39 U.S.C. § 3008 (App. 4-6), which grants to the recipient, in his sole discretion, the right to bar all mailings to him from any sender on the grounds that the material sent is sexually provocative. According to Congress, § 3008 struck the "proper balance between an individual citizen's right to privacy in his home or other place of abode and the right of a citizen to utilize the U.S. mails." S. Rep. No. 801, 90th Cong., 1st Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 2258, 2294-95.

It was the subject matter or ideological content of the mailed material promoting contraceptives which was the original and continuing focus of the Comstock Act and its revisions. These Acts reflected a view of the role of government in personal matters which has now been deemed improperly intrusive as a matter of constitutional law. *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977).

The Comstock Act and its progeny were directed towards prohibiting communication about specific subjects—contraception and venereal disease control. As applied to Youngs' proposed mailings, the statute offends the Constitution by doing precisely that.

C. The Statute Regulates Fully Protected Communication Of Ideas By Commercial Speakers.

This Court has previously construed commercial speech as limited to (1) communications which relate "solely to the economic interests of the speaker and its audience," *Central Hudson Gas* v. *Public Service Commission*, 447 U.S. 557, 561 (1980); (2) communications which are nothing more than a proposal to engage in a commercial transaction, *Id.* at 562 and 572 (Brennan, J. concurring); or (3) communications which are no more than exposition of prices and products, *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 779-781 (1976) (Stewart, J. concurring).[18]

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[18] Even advertisements containing only price and product information may involve "the exercise of freedom of communicating information and disseminating opinion" when they pertain to sensitive and important issues, such as birth control, which are otherwise protected by the constitutional right to privacy under the Fifth

(footnote continued)

The material at issue here, however, is not so limited. The flyers include educational information. The pamphlets are primarily informational and ideological. None of them contains only price or product information.

For example, the typical pharmacy advertising flyer, in which Youngs' advertisement is one of many (J.A. 45; App. 10), does contain price and product information, but it also contains information advocating contraception.[19]

(footnote continued)
and Ninth Amendments. *Bigelow* v. *Virginia*, 421 U.S. 809, 822 (1976). In *Bigelow*, the Court recognized that an advertisement for abortion services placed by a New York clinic in a Virginia weekly newspaper, although a commercial advertisement, conveyed information of "potential interest and value." *Id.* at 822. The appellant's right to speak in *Bigelow* coincided with the rights of the recipients to be informed. *Id.* The *Bigelow* ad although it was "in part a commercial advertisement was far more than that." *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 539 (1981) (Brennan, J., concurring).

[19] The textual information is: "Once you have decided that both the pill and IUD's are not for you, you are faced with another important decision. What method of contraception will be best for you. If you answer yes to these questions

YES	NO	
——	——	Do you want protection that's extremely effective preventing conception?
——	——	Do you want protection that is also highly effective in preventing VD?
——	——	Do you want a birth control method without harmful side effects?
——	——	Do you want a contraceptive that is sensitive and quite natural?
——	——	Do you want an inexpensive easy to buy, easy to use contraceptive that's available in different types to meet your needs?

Then you have to say YES to prophylactics." (J.A. 45; App. 10.)

The flyer devoted exclusively to Trojan® condoms contains essentially the same text. (J.A. 21; App. 11.) The pamphlet on "Condoms and Human Sexuality" contains a history of the condom and a description of how it works as a contraceptive and as a prophylactic with descriptions of different Trojan® products. (J.A. 23-31; App. 13-24.) The pamphlet "Plain Talk About Venereal Disease" contains no price or product information and simply explains venereal diseases, how they are transmitted, and how they can be prevented by using condoms. Youngs Drug Products Corp. is mentioned only on the final page as the distributor of Trojan® brand prophylactics. (J.A. 32-39.) The government contends all of these materials fall within the statutory ban. (J.S. App. 3a-5a.)

In *Associated Students* v. *Attorney General*, 368 F. Supp. 11, 21 (C.D. Cal. 1973), a three-judge court invalidated the same statute at issue here, on the grounds that, as applied to unsolicited advertisements distributed by a student government organization, the statute denied to many persons "the knowledge, otherwise lacking, necessary to enable them to make an informed decision as to whether to bear children." The court rejected the proposition that the Birth Control Handbook and a sheet describing where Dalkon shields could be obtained were properly defined as commercial speech; rather, these materials expressed an opinion on social policy and family planning. *Id.* at 24. The court held that the Post Office had attempted to expand "advertisement" beyond its commercial sense. The content of the speech here is indistinguishable from the speech in *Associated Students*.[20] The *Associated Students*

[20] Indeed, Judge Penn recognized that Young's proposed mailings, particularly the flyers, "appear to be less explicit and potentially less offensive to sensitive addressees than was the detailed booklet on birth control and abortion practices and resources in *Associated Students*." (J.S. App. 7a.)

court also rejected the argument that the "advertisements" were commercial speech because, *inter alia*, the students who were plaintiffs in the case had no financial interest in the mailings.

The appellants incorrectly interpret the decision in *Associated Students* as focusing on the mailer in distinguishing commercial from non-commercial speech. The appellants proceed from this faulty premise to argue that "by its terms 39 U.S.C. § 3001(e)(2) applies only to advertisements and the Postal Service has further interpreted it not to apply where the mailer has no 'commercial interest' in the materials. Section 3001(e)(2) therefore reaches only commercial speech." (Br. 13-14.) The court below accepted this proposition in determining that only commercial speech was at issue: "this *mailer* because of its commercial interest has less freedom than the *Associated Students* mailers from regulation. . . ." (J.S. App. 7a.) (Emphasis in original.)

The appellants and the court below have confused the category of commercial speech with the category of individuals who have a commercial interest in protected speech. This Court has never held that the content or classification of speech can be determined by the motive of the speaker. Indeed, the Court in *Metromedia* v. *San Diego*, 453 U.S. 490, 504 n.11 (1981), reiterated its prior exposition on this point:

> '[O]ur cases long have protected speech even though it is in the form of paid advertisement . . . ; in a form that is sold for profit . . . ; or in the form of a solicitation to pay or contribute money . . . If commercial speech is to be distinguished, it "must be distinguished by its content."'

Quoting *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 363. (1977) (citations omitted).

The right of a commercial enterprise to advocate positions which are in its economic interest is demonstrated by the recent decision in *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980). In that case, the Court held that the pro-nuclear power mailings by Consolidated Edison, which had a clear economic interest in the message, were fully protected speech. The value of the speech and its capacity to inform does not depend on the motive of the speaker. *Id.* at 533. Economic self-interest is the motivation for a great deal of speech which is of political and social importance. It is, for example, the premise for labor picketing and for a great deal of lobbying and editorializing. The nuclear power advocacy in *Consolidated Edison* cannot be distinguished from the advocacy of contraceptives and prophylactics by Youngs. Both are ideological expression pertaining to important health and social issues. They are editorial in nature and are not limited to promotion of specific sales. The only distinguishing factor between Consolidated Edison's speech and Youngs' speech is the content of the expression itself, but "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

The appellants also suggest that linking commercial messages with informational or editorial materials which pertain to a public debate is not a sufficient basis for a grant of full First Amendment protection. (Br. 14-15.) There is no support for this proposition. Although the appellants cite *Central Hudson Gas* v. *Public Service Commission*, 447 U.S. at 562 n.5, in that case the Court specifically stated that the challenged order expressly excluded "institutional and informational" messages from the ban on speech and was restricted to advertising "clearly intended to promote sales."

The thrust of the Court's footnote comment was that material containing only price and product information, does not become non-commercial because it relates to a topic of importance.[21] The appellants also cite Justice Brennan's comment in *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490, 540 (1981), that those seeking to convey commercial messages will engage "in the most imaginative of excuses to place themselves within the safe haven of noncommercial speech, while at the same time conveying a commercial message." (Br. 15.) Neither that quote nor the remainder of Justice Brennan's opinion suggests that ideological messages are not protected when they accompany commercial speech. Justice Brennan stated, on the contrary, that the line between ideological and nonideological speech is so difficult to draw that government officials should not be "put in the position in the first instance of deciding whether the proposed speech is commercial or noncommercial." *Id.* at 536.

This Court has held that "the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception . . ." *Carey* v. *Population Services Int'l,* 431 U.S. 678, 685 (1977). *See Bigelow* v. *Virginia,* 421 U.S. 809, 822 (1975); *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976). The appellants' assertion (Br. 31), that Youngs' communications may be restricted because they relate to the sensitive and constitutionally protected arena of decision-

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[21] The Court has previously held, however, that what may be commercial speech in some contexts is nevertheless fully protected when it pertains to decision-making about childbearing, which is protected by the Fifth and Ninth Amendments. *Bigelow* v. *Virginia,* 421 U.S. 809 (1975).

making involving conception and contraception, is a complete inversion of constitutional values.[22]

The First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern . . ." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940). Informed decision-making cannot take place if there is a governmentally imposed restriction on free discourse. *Associated Students* v. *Attorney General*, 368 F. Supp. 11, 21-22 (C.D. Cal. 1973).

II. 39 U.S.C. § 3001(e)(2), AS APPLIED TO YOUNGS' MAILINGS, SERVES NO COMPELLING GOVERNMENTAL INTEREST AND IS NOT A TIME, PLACE, OR MANNER RESTRICTION.

A. There Is No Compelling Governmental Interest.

The statute is a restriction on speech relating to constitutionally protected subjects. This restriction may therefore be justified only if it is finely attuned to meeting a compelling governmental interest:

> [W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.

Carey v. *Population Services Int'l*, 431 U.S. at 686.

The most serious scrutiny is also required when a regulation is not content neutral but is specifically aimed at

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[22] The concept that discussing these private matters in the home is more offensive than such discussion in public places offends common sense. To the contrary, requiring public sales as opposed to mail order sales of contraceptives in *Carey* v. *Population Services Int'l* was recognized to be a burden on the same constitutional privacy rights at issue here, because the home afforded a place less embarassing to make deliberations on these matters. 431 U.S. at 678 n.5.

the ideas conveyed, such as the prohibition against promotion of contraceptives here. *Consolidated Edison* v. *Public Service Commission,* 447 U.S. 530, 537 (1980); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). This careful review of content regulation is required whether commercial or non-commercial speech is involved. *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 96-97 (1977); *Carey* v. *Population Services Int'l,* 431 U.S. at 701 n.28; *Carey* v. *Brown,* 447 U.S. 455, 464-65.[23] None of the justifications which the appellants suggest to support the legislation can sustain its validity in the face of the required analysis.

This Court has recently rejected the very proposition the appellants put forward here—that preventing unwilling recipients from receiving unsolicited "offensive" mailings in their homes is a compelling governmental purpose:

> Even if a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers, the ability of government 'to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.' *Cohen* v. *California,* 403 U.S. at 21. A less stringent analysis would permit a government to slight the First Amendment's 'role in affording the public access to discussion, debate, and the dissemination of information and ideas.'

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[23] The district court was therefore in error in applying a relaxed standard requiring only a substantial governmental interest. (J.S. App. 10a-11a.) Despite the fact that the district court erroneously ruled the speech at issue is commercial (J.S. 8a-10a), it also ruled the restriction was a content restriction. (J.S. App. 18a, n.12.) The latter ruling, as well as the fact that the constitutionally protected right to privacy was at stake, required heightened scrutiny of the statute.

Consolidated Edison v. *Public Service Commission*, 447 U.S. 530, 541 (citations omitted).

The district court here properly ruled that this statute, like the *Consolidated Edison* regulation, was the product of an erroneous assessment of the seriousness of the intrusion. (J.S. App. 13a-15a.) The customer of Consolidated Edison could escape exposure to objectionable material simply by transferring the bill insert to the wastebasket. *Id.* at 542. The Court also suggested that government recognition of the special privacy interests of persons who seek seclusion within their own homes was more properly served by allowing objecting customers to remove their names from the mailing list. *Id.* at n.11.[24] In so finding, the Court rejected the proposition that the nature of the mails—as opposed to broadcast media, *FCC* v. *Pacifica Foundation*, 438 U.S. at 748-749 (1978)—permits the government to censor all unsolicited mail to protect a sensitive

[24] The Court approved the use of a statute like 39 U.S.C. § 3008 (App. 4-6), upheld as constitutional in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970) (*Consolidated Edison* at 542 n.11), which would permit the recipient in his sole discretion to remove his name from the mailing list. There can be no credence given, therefore, to the government's contention that § 3008 places an excessive burden on the unwilling recipient of allegedly offensive mail. (Br. 7-8 n.5.) Indeed, in *Rowan* itself the Court held the addressee "may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise." 397 U.S. at 737. Section 3008, which applies to all mail, passed constitutional muster because "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from the mailer." *Rowan*, 397 U.S. at 737.

recipient from even a single brief exposure to an unwanted message. (Br. 35.)[25]

The Court has also specifically rejected the appellants' proposition that offensiveness is a sufficient basis for a ban on speech in the context of advertising relating to contraceptives. In *Carey* v. *Population Services Int'l*, when the appellants contended such advertisements were offensive and embarrassing, the Court stated: "these are classically not justifications validating suppression of expression protected by the First Amendment." 431 U.S. at 701.

The desire of parents to regulate non-obscene information about contraception and family planning matters which reaches their minor children (Br. 29) also fails to justify a universal ban on unsolicited mailings sent to minors and adults alike.[26] Speech that is neither obscene nor subject to some other legitimate proscription "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213-214 (1975).

Nor can the concept that motivated Comstock—that promotion of contraceptives is immoral and indicates that society sanctions illicit sex—satisfy the strictures placed

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[25] The statute itself permits solicited mail to contain contraceptive advertising. But soliciting a magazine does not establish that an addressee expects to receive any particular advertisement. Furthermore, a magazine which previously carried no contraceptive advertising can introduce such ads and thereby subject the reader to the single brief exposure the government so deplores, before he can remove his name from the mailing list.

[26] The cautious parents who find it impossible to review mail before their children see it (Br. 28) could easily provide themselves with a locked mailbox.

on regulation of speech. In *Carey* v. *Population Services Int'l*, 431 U.S. 678, 694 (1977), where one aspect of the challenged statute was specifically directed at prohibiting distribution of contraceptives to those under 16 years of age, the Court rejected the premise that minors' sexual activity was likely to be deterred by increasing the hazards attendant to it. *Id.* at 694. The purpose behind the *Carey* statute was not compelling and the statute was not substantially related to the goal. The relationship between the goal of protecting minors and the regulation here is even more tenuous because the class of recipients is grossly overinclusive. Adults as well as children are barred from receiving Youngs' mailings. The district court, therefore, correctly held the statute was more extensive than necessary to meet the asserted government interest. (J.S. App. 12a-13a.) The court in *Associated Students* also found that a justification premised on the promotion of public morals could not justify the infringement of speech and the right to privacy which § 3001(e)(2) entails, particularly where the moral judgment involved is subject to wide-ranging dispute. 368 F. Supp. 22 n.3.

Like the advertisements in *Carey*, and the materials in *Associated Students*, the mailings in this case cannot even remotely be characterized as inciting illegal sexual activity among the young. They do not present the clear and present danger which may satisfy a compelling state interest. *See Carey*, 431 U.S. at 701, *citing Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). Youngs' proposed mailings promote the use of prophylactics and provide information that is both legal and necessary to making informed and constitutionally protected decisions.

B. The Statute Is Not A Time, Place, Or Manner Restriction.

The appellants suggest that the statute is a permissible restriction because it allows solicited mail communication about contraceptives, because it permits unsolicited advertising by non-commercial mailers, and because it has no impact whatever on advertisements for contraceptives in other media. (Br. 9-10, 16-17.) None of these factors transforms the statute into a permissible "time, place, or manner" restriction.

The appellants are in error in suggesting that a mailer has a diminished right to communicate with someone who is totally uninformed as opposed to a person who solicits information. (Br. 7.) A right to communicate with those who are already informed or who know they are interested in the topic is an extremely limited right. In *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 93 (1977), this Court rejected the contention that prohibition of realty "for sale" signs, as opposed to other "for sale" signs, was a permissible restriction, in part because alternative forms of communication restricted the ability of the advertiser to reach the uninformed. Alternatives were "less likely to reach persons not deliberately seeking sales information . . . , and may be less effective media for communicating the message . . ." (citations omitted).[27] In *Associated Students,* the court found the prohibition against unsolicited mailings denies to many persons the knowledge, which they might otherwise fail to

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[27] The *Linmark* decision also rejected the proposition that a more costly alternative avenue for speech was a real alternative. 431 U.S. at 93. Therefore, the appellants' assertion that pre-mailing would be permitted at duplicative cost to Youngs cannot serve to support the statute. (Br. 34.)

obtain, which is necessary to make informed decisions. 368 F. Supp. at 21. Youngs itself has already determined that the other methods of communication are not wholly satisfactory. (J.A. 14.)

The appellants also surprisingly assert that the statute is strengthened by the fact that it permits non-commercial speakers to send the identical materials through the mail. As already noted, this kind of distinction between speakers is highly suspect and diminishes the validity of the appellants' argument regarding the purposes which supposedly underlie the statute. (See p. 20, *supra.*) Moreover, this assertion is premised on the erroneous assumption that a commercial speaker has no right to speak whatever—that the First Amendment's protection for commercial speech derives exclusively from the right of the audience to be informed about commercial matters. (Br. 19-20.)

The commercial speaker, however, does have a right to communicate. The vital economic interest of the speaker has never been ignored or demeaned by this Court. Neither profit motive nor economic self-interest has yet become repugnant to accepted American values. A commercial speaker has a right to get his economic message across. In *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), this Court recognized that corporate speech is not entitled to less protection because "the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association or individual." *Id.* at 777 (*quoted in Consolidated Edison,* 447 U.S. at 533). *See Thomas* v. *Collins,* 323 U.S. 516, 531 (1945). The commercial speaker is also protected if his speech is commercial speech. "Commercial expression not only serves the economic interest of the speaker, but also assists consumers

and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson*, 447 U.S. at 561-562. "[W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). A total ban on unsolicited mail communications by Youngs cannot be tolerated.

Therefore, even if the appellants' contention that only commercial speech is involved here were correct, the district court's holding that the statute is unconstitutional would have to be affirmed. The Court, in its recent opinion in *In re RMJ*, 102 S.Ct. 929, 939 n.20 (1982), noted that even where there is evidence that commercial speech is distressing (and there is no such evidence here), a stamped warning on an envelope is an appropriate remedy. The district court's order permits the free flow of drug store flyers. Material exclusively relating to contraception is to be mailed in a closed envelope with notice that contraceptive information is enclosed and that the recipient has a right to remove his name from the mailing list. Under any theory, the district court's order provides the maximum permissible restrictions of Youngs' mailings on the topics of contraceptives and the prevention of venereal disease.

The final argument that the appellants make is that the statute's prohibition against unsolicited mailings is a permissible manner restriction because it does not foreclose any other medium of expression. (Br. 17, 19.) The Court has long recognized the unique role of the mails in preserving First Amendment values:

> The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much as part of free speech as the right to use our tongues . . .

Blount v. *Rizzi*, 400 U.S. 410, 416 (1977) (*quoting* Holmes, J). Foreclosure of this forum which is a governmental monopoly cannot be lightly undertaken. "That the proscription applies only to one mode of communication, therefore, does not transform this into a 'time, place or manner' case." *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. at 94.

The Court has also repeatedly rejected the proposition that a content-based restriction may be justified on the grounds that other media of expression are available. *Consolidated Edison*, 447 U.S. at 541 n.10. A constitutionally permissible time, place, or manner restriction may not be based upon either the content or the subject matter of speech. *Consolidated Edison* at 536 (restriction limited to mailed bill inserts.) "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939), *cited in Carey* v. *Brown*, 447 U.S. 455, 468, n.13.

CONCLUSION

Section 3001(e)(2) unconstitutionally limits the speech of a single group of speakers; the statute is unlawfully directed against the content of communications; and the statute disturbs the free flow of information necessary to implement fundamental privacy rights which this Court has repeatedly recognized.

For the above stated reasons, Youngs Drug Products Corporation respectfully requests that this Court affirm the decision of the district court declaring that the statute is unconstitutional.

Respectfully submitted,

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Dated: October 14, 1982

APPENDIX

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

39 U.S.C. § 3001(e) provides:

(1) Any matter which is unsolicited by the addressee and which is designed, adapted, or intended for preventing conception (except unsolicited samples thereof mailed to a manufacturer thereof, a dealer therein, a licensed physician or surgeon, or nurse, pharmacist, druggist, hospital, or clinic) is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs.

(2) Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement—

(A) is mailed to a manufacturer of such matter, a dealer, therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or

(B) accompanies in the same parcel any unsolicited sample excepted by paragraph (1) of this subsection.

An advertisement shall not be deemed to be unsolicited for the purposes of this paragraph if it is con-

tained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive.

18 U.S.C. § 1461 (West Supp. 1982)

Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned of not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

Domestic Mail Manual, § 123.434

Unsolicited advertisements for articles or things which are designed, adapted or intended for preventing conception are nonmailable, except when sent to a manufacturer of such articles or things, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic or when the mailer has no commercial interest in any such item. Advertisements contained in a publication for which the addressee has paid or promised to pay a consideration, or which he has otherwise indicated he desires to receive, are not deemed unsolicited for the purposes of this section (39 U.S.C. § 3001).

39 U.S.C.A. § 3008 (West 1980)

Prohibition of pandering advertisements

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postal Service shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addresses, effective on the thirtieth calendar day after receipt of the order. The order shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addresses.

(d) Whenever the Postal Service believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, it

shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for its belief and request that any response thereto be filed in writing with the Postal Service within 15 days after the date of such service. If the Postal Service, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, it is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punishable by the court as contempt thereof.

(f) Receipts of mail matter 30 days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postal Service shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5, relating to administrative procedure, and chapter 7, relating to judicial review, of title 5, shall not apply to any provisions of this section.

(i) For purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postal Service, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postal Service's order; and

(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parentchild relationship.

PARK PLAZA PHARMACY
1773 University Avenue
Bronx, New York
583-5900

SALE STARTS TODAY! SALE ENDS IN 14 DAYS OR WHEN SUPPLIES ARE EXHAUSTED!

...GO ON A SPRING SAVINGS SPREE...



MARTINSON COFFEE
RED-REG. or BLUE-FINE
1-lb Can **1.89** EA.

TIDE DETERGENT
GIANT SIZE-49 oz.
1.48 PKG.
NOT AVAILABLE IN SUFFOLK COUNTY





Chicken of the Sea TUNA
CHUNK WHITE-IN OIL
6½ oz. Can **77¢** EA.

COTTONELLE Toilet Tissue
COTTONY SOFT
4 PK. **88¢** PK.





PROFESSIONAL
TEK TOOTH BRUSHES
ASS'T COLORS & SIZES
5 FOR **88¢**



SAFETY CUSHIONED ENDS
Q-TIPS COTTON SWABS
FLEXIBLE STICKS
59¢
170'S



2¼ oz. BOTTLE
CHARLIE COLOGNE
7.75 VALUE
OR
3 oz. BOTTLE
JONTUE SPRAY
7.50 VALUE
Your Choice! **5.88**

We Reserve The Right To Limit Quantities — Not Responsible For Typographical Errors

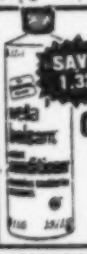
HEALTH AND

Beauty Aids at BIG SAVINGS



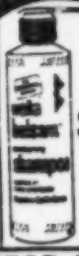
SAVE 1.70

ALBERTO VO5 HAIR SPRAY
REG. OR HARD TO HOLD
12 Oz. Plus Reserve 3 oz.
1.49 EA.
3.19 Value



SAVE 1.32

WELLA BALSAM INSTANT CONDITIONER
REG. OR EXTRA BODY
1.17 EA.
16 oz. 2.49 VALUE



WELLA BALSAM SHAMPOO
NORMAL OR OILY
1.77 EA.
3.75 VALUE

SAVE 1.98



SAVE $2.02

TONI SILKWAVE
1.77 EA.
3.79 VALUE



HEAD & SHOULDERS SHAMPOO
7 oz. Tube or 11 oz. Lotion
1.79 EA.



EFFERDENT DENTURE CLEANSER
1.38 EA.



EXTRA-STRENGTH TYLENOL TABLETS
1.66 EA.



SAVE $1.26

MYLANTA ANTACID LIQUID
12 oz.
1.49 EA.
2.75 Value



AYDS REDUCING CANDY
24 oz. Chocolate or Vanilla
2.99 EA.



MENNEN SPEED STICK
REGULAR 2.5 oz.
89¢ EA.



FLICKER LADIES SAFETY SHAVER
5's
89¢ EA.



BUF-PUF CLEANSING SPONGE
1.49 EA.



DISPOSABLE BIC SHAVER
PKG. OF 4
44¢ EA.



TRIM NAIL CLIPS
33¢ EA.



PLAYTEX 28'S DEODORANT TAMPONS
REG. SUPER OR SUPER PLUS
1.59



30'S STAYFREE MAXI-PADS
1.88 EA.



WITH FLUORISTAN CREST TOOTHPASTE
6 oz.
79¢ EA.



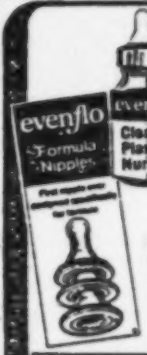
MOISTURIZING NIVEA CREME
6 oz.
1.38
2.39 VALUE



SCOPE MOUTH WASH
24 oz. BOTTLE
1.29

We Reserve The Right To Limit Quantities—Not Responsible For Typographical Errors


POPCORN
16 oz. Cello-Pak
88¢ BAG
WHAT-A LOT-A POPCORN
ONE POUND
The Same Tasty Popcorn That's Served at the Movie Theatres
13¢ OFF
DAWN
DAWN DISH DETERGENT
22 oz. BOTTLE
88¢ BTL.
NOT AVAILABLE IN SUFFOLK CO.
YOUR CHOICE NESTLE MINIATURES
Choose Bags Of:
•Milk Chocolate
•Choco-Lite Bars
•Crunch Bars
1.44 EA.
10 Trash Bags
10 DISPOSABLE TRASH BAGS
Fits 20/30 Gallon
69¢ PKG.
1.39 VALUE
SPONGE-O-MATIC SPONGE MOP
3.59 EA.
15 Tall Kitchen Garbage Bags
15 TALL KITCHEN GARBAGE BAGS
Large 44 Qt. Size
69¢ PKG.
1.39 VALUE
SAVE $1.80*
Sergeant's
SERGEANT'S FLEA & TICK COLLAR
For Small to Large Dogs, Puppies or Cats
1.49
3.29 Value!
PLASTIC TUBULAR HANGERS
8 FOR $1.00
•Yellow •White •Chocolate
ORNAMENTAL AIR FRESHNER
Assorted Styles
66¢ EA.
5" PLASTIC ASHTRAYS
3 FOR $1.00
Assorted Colors
Sure Shape
NO NONSENSE COMFORT STRIDE PANTY HOSE
1.79 EA.
PLAYTEX LIVING GLOVES WITH FREE GLOVE
1.27 EA.
Living
FREE GLOVE
EVEREADY ALKALINE BATTERIES
AA or 4 Pk.
1.47
2.69 VALUE
9 Volt
97¢
1.89 VALUE
SAFE GUARD Deluxe
10W40 DELUXE MOTOR OIL
By Sunoco
49¢
Limit 1 Case Per Customer
WATERFINGERS MASSAGER by CONAIR
Reg. Price 19.99
Sale Price 13.99
Mfg's Rebate 5.00
Your Final Cost 8.99
Model # WF-1
Deluxe hand-held shower massager relaxes, massages and leaves you pampered. It makes a shower an experience.
SAVE $10.07*
PANASONIC LED DIGITAL AM/FM CLOCK RADIO
MFG. SUGG. LIST 39.95
29.88 EA.
100% solid state circuitry. LED silent bright red display. 24-hour timer. 59-minute sleep switch. 2-step brightness control. Wake to music or buzzer alarm. Model RC-88.
CONAIR 120 WATT PRO COMPACT DRYER
Regular Price 14.99
9.99 EA.
Powerful and compact dryer has two speeds and temperature setting. Perfect for on the go people! Model RC99.
SAVE $5.00*



EVENFLO BABY PRODUCTS

- 4 oz or 8 oz. CLEAR PLASTIC NURSER
- FORMULA NIPPLES-AMBER 3's
- JUICE NIPPLES-ORANGE 3's
- MILK NIPPLES-PINK 3's
- WATER NIPPLES-BLUE 3's

Your Choice! **3 FOR 1.00**



JOHNSON'S **BABY POWDER**
14 oz. Size

1.28



Q-TIPS **COTTON SWABS**
170's

59¢



THICK, SOFT CUSHIONY
SCOTT BABY FRESH WIPES
Cleans gently and thoroughly.
Package of 40

97¢

Once you've decided that both the pill and IUD's are out for you, you're faced with another important decision. What method of Contraception will be best for you? If your answer Yes to these questions:

YES NO

Do you want protection that's extremely effective in preventing pregnancy?

Do you want protection that is also highly effective in preventing VD

Do you want a birth control method without the risk of side effects?

Do you want a contraceptive that's convenient and quick to use?

Do you want an inexpensive method that's also effective when used correctly that's available in different types to suit your needs?

Then you have to say YES to prophylactics.



ROLLED LATEX CONDOMS
Trojan-enz Lubricated
12's **1.69**



ROLLED LATEX CONDOMS
Trojan's Ribbed
12's **2.27**



FAST, EFFICIENT PHOTO PROCESSING



C126-20 or C110-20 KODAK FILM
Your Choice!
1.44 EA.



SYLVANIA FLASH BAR
1.77 EA.

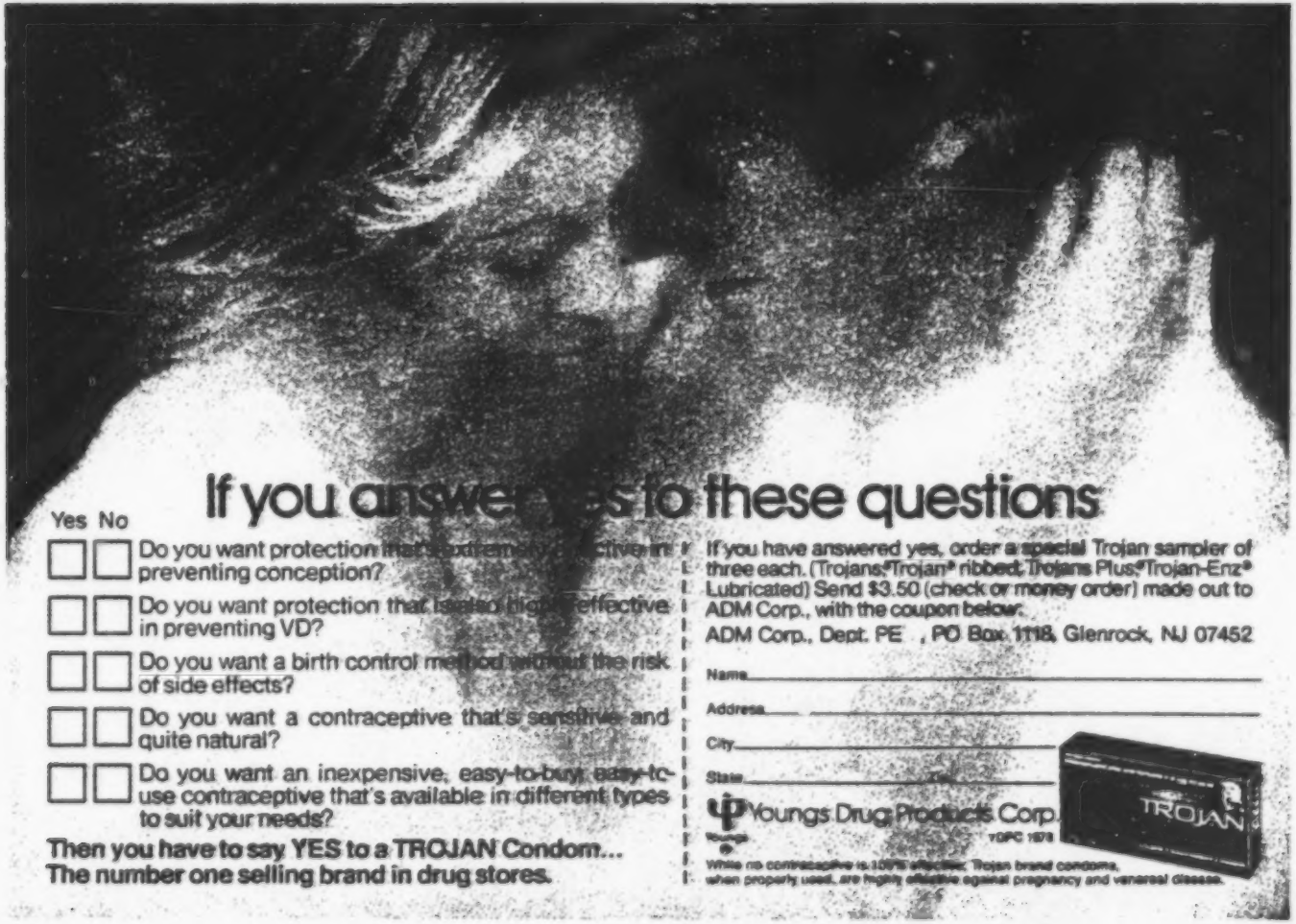


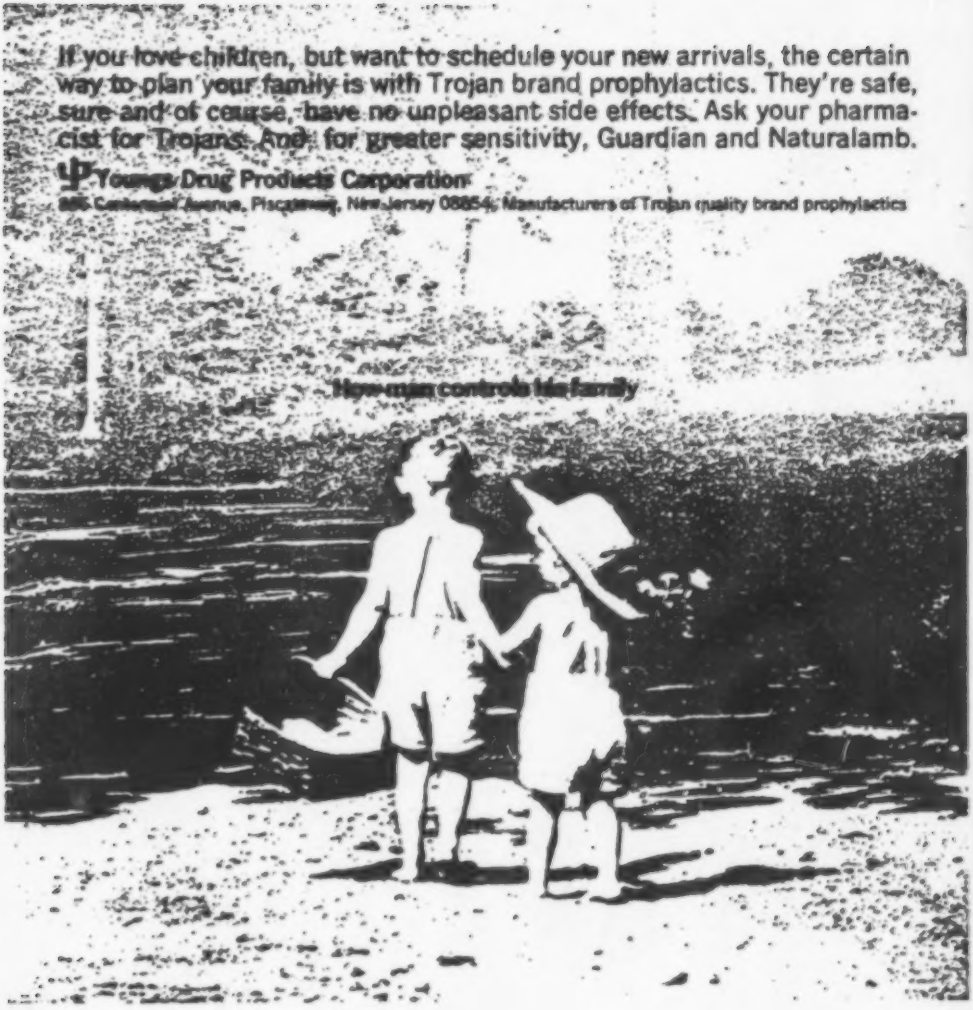
SYLVANIA MAGI-CUBES
REG. 1.77 EA.
1.37 EA.



SYLVANIA FLIP FLASH-10
1.37 EA.

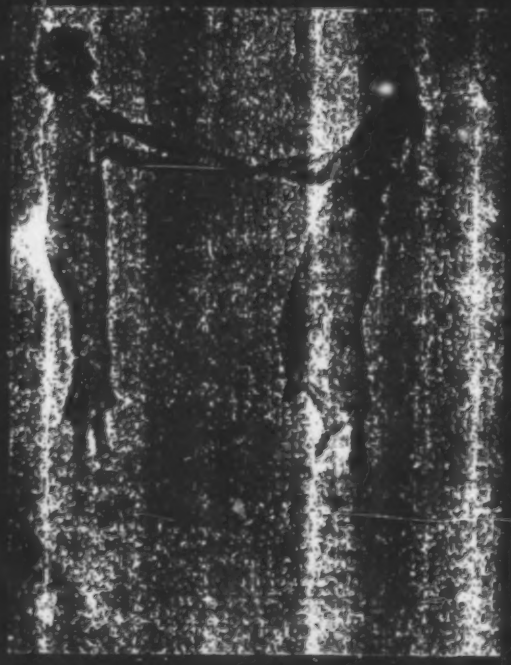
All merchandise on sale has been purchased first due to clothes and other unforseen situations we cannot guarantee their availability.


If you answer yes to these questions
Yes No
Do you want protection that is extremely effective in preventing conception?
Do you want protection that is also highly effective in preventing VD?
Do you want a birth control method without the risk of side effects?
Do you want a contraceptive that's sensitive and quite natural?
Do you want an inexpensive, easy-to-buy, easy-to-use contraceptive that's available in different types to suit your needs?
Then you have to say YES to a TROJAN Condom...
The number one selling brand in drug stores.
If you have answered yes, order a special Trojan sampler of three each. (Trojans,® Trojan® ribbed, Trojans Plus,® Trojan-Enz® Lubricated) Send $3.50 (check or money order) made out to ADM Corp., with the coupon below.
ADM Corp., Dept. PE , PO Box 1118, Glenrock, NJ 07452
Name
Address
City
State
Youngs Drug Products Corp.
YDPC 1078
TROJAN
While no contraceptive is 100% effective, Trojan brand condoms, when properly used, are highly effective against pregnancy and venereal disease.


If you love children, but want to schedule your new arrivals, the certain way to plan your family is with Trojan brand prophylactics. They're safe, sure and of course, have no unpleasant side effects. Ask your pharmacist for Trojans. And for greater sensitivity, Guardian and Naturalamb.
Youngs Drug Products Corporation
Manufacturers of Trojan quality brand prophylactics
How man controls his family

CONDOMS* and HUMAN SEXUALITY

What you should know... but didn't know who to ask.



*Also known as... prophylactics, rubbers, contraceptives, lambskins, safes, pros.

What is a Condom?

The condom (prophylactic) is a sheath or cover for the penis... worn during sexual intercourse to help keep the male sperm from entering the vagina and contacting the female egg. At the same time, the condom is a prophylactic since it aids in the prevention of a venereal disease being transmitted through sexual intercourse from an infected person to a non-infected person.



Is the Condom New?

No.

The condom traces its origin back to the 16th Century. There are historical references that, during the Egyptian era, condoms were made out of papyrus soaked in water and out of sheaths made from moistened linen fabric. The invention of the condom, or at least its name, has been attributed to a physician in the Court of King Charles II by the name of Dr. Condom.

What are modern Condoms made of?

Today's quality condoms are made either of natural latex (rubber) or specially processed natural membrane material (lambskin).

3

How are Condoms manufactured?

The manufacture of today's quality condoms is a modern, efficient, streamlined and quality controlled process taking place on an "assembly line" as long as a football field. While it is a rather complex process, it can basically be described as follows: Rotating glass forms, each representing an individual rubber condom, are dipped into a vat of natural latex rubber carefully compounded with other ingredients to assure continuous quality. The rotating glass form then goes through a "curing" process consisting mainly of heat and then the whole process is repeated a second time. At the end of the process the individual condoms are removed from the glass forms . . . and, in the case of TROJAN®-brand condoms, are dusted with the purest and finest powders. They are then prepared for the testing process, lubrication, unit packaging and shipment.

How are Condoms tested?

TROJAN-brand rubber condoms are electronically tested by a process where each condom is put on a stainless steel form and dipped into a highly electrically charged water bath. Even the smallest holes will thus transmit the electrically charged water to the stainless steel form which will close the circuit and give indication that this condom cannot be further processed. It will automatically be rejected from the assembly line and ground into scrap.

4

Why all the talk about Condoms?

Because today, more than ever in history, the condom is playing a major role as an aid in:

- **The prevention of pregnancy**
- **The prevention of venereal and other diseases that may be transmitted sexually**

Yes! The condom, when properly used is BOTH a contraceptive and a prophylactic! **Unlike other drugs, foams, pills and devices, the condom is the only contraceptive with this proven value as a prophylactic. And, most importantly, the condom performs this dual role without any dangerous side effects.**



How do you properly use a Condom?

BEFORE INTERCOURSE

1. **Place the condom on the penis as soon as erection occurs, prior to genital contact or penetration.**
2. **Pull the condom over the head of the penis. Leave about ½" space at the end. (Some condoms have small receptacle ends (enz) which provides the required space.) Squeeze end slightly to release air to avoid an air pocket.**



3. **Slowly unroll until entire penis has been covered.**

AFTER INTERCOURSE

4. **Promptly withdraw the penis before losing erection. Grasp open end of condom tightly to avoid having it slip off. During withdrawal this will prevent spillage that might transmit infection or cause pregnancy.**



5. **To further reduce chance of venereal disease, immediately wash the penis and surrounding area.**
6. **Do not use vaseline or any other oil base lubricants with latex (rubber) prophylactics.**

Are Condoms helpful in preventing other unwanted complications or diseases that result from sexual activity?

Yes!

While there is still much debate, medical authorities are beginning to recognize that sexual activity may be the means of transmitting a number of diseases. Various common forms of Vaginitis (such as Trichomonas) can be transmitted sexually. There is also the scientific possibility that certain virus-caused conditions might be associated with cancer of the prostate in men and cancer of the cervix in women when these viruses (such as Herpes Simplex II) are sexually transmitted back and forth between male and female.

Does using a Condom reduce sensitivity and sexual satisfaction?

No!!!

By offering the condom user a wide choice of modern materials such as natural latex (the material used in surgeon's gloves)... natural animal membrane and various lubricants, the whole range of sensitivity requirements is satisfied. As a matter of fact, the finest condoms are thinner than a human hair... and thinness is the first step towards sensitivity. Because the use of a condom gives protection against venereal disease and pregnancy, couples using the condom are more relaxed... and sexual satisfaction may be more easily obtained.



6

WHAT ARE THE DIFFERENT TYPES OF CONDOMS AND WHAT ARE THEIR ADVANTAGES?

Natural Membrane Condoms...

Truly a different type of condom... because it is made from the most natural of materials... a lamb membrane. They have the same strength and give the same protection and assurance as rubber condoms... but because they are a natural membrane they feel better... feel more natural... and conduct more of the sensitivity than latex (rubber) condoms do. Modern lambskin condoms are lubricated and rolled for further sensitivity and convenience.



TROJAN-Brand
NATURALAMB®
are individually tested, rolled, easy to open, lubricated, natural membrane condoms.

Lubricated Rubber Condoms... "Jelly" type

Lubricated rubber condoms offer the advantage of easier penetration and greater sensitivity than non-lubricated rubber condoms. The more commonly known "jelly" lubricant uses a surgical, non-petroleum base.



TROJAN-Brand
GUARDIAN®
(a premium lubricated product) and
TROJAN-ENZ®
LUBRICATED
are "jelly" type lubricated condoms.

7

For Her Pleasure
(which of course means more pleasure for both partners)

Specially Ribbed Condoms...
the latest in condom technology,
scientifically textured with
delicate ribs for her pleasure...
specially lubricated with a dry silicone
lubricant for the ultimate in sensitivity.



TROJAN
RIBBED
GOLDEN TRANSPARENT
CONDOMS
are specially lubricated and ribbed
for her pleasure.

Lubricated Rubber Condoms...
Special "Dry" type



GOLDEN COLORED
TROJANS *Plus*®
is a condom lubricated with
a special silicone lubricant, which
many people prefer.

8



Shaped and Colored Condoms...

Some rubber condoms have a special (body-hugging) shape to fit and feel more natural. And when pastel colored and combined with special lubricants, they offer the maximum sensitivity and satisfaction in rubber condoms.



GOLDEN COLORED TROJANS *Plus* is a naturally shaped, specially "dry" lubricated condom.

Dry Rubber Condoms...

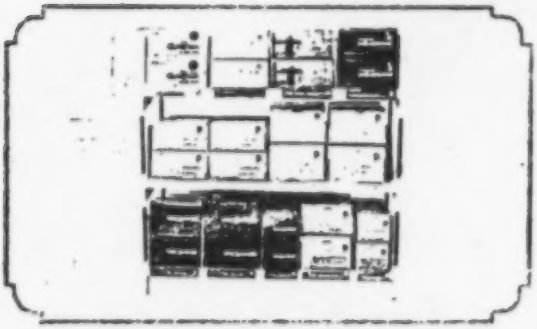


For those people who prefer a dry condom, there are basically two types... the blunt or rounded end... and those with a special receptacle (reservoir) end to provide a natural air space for extra safety.

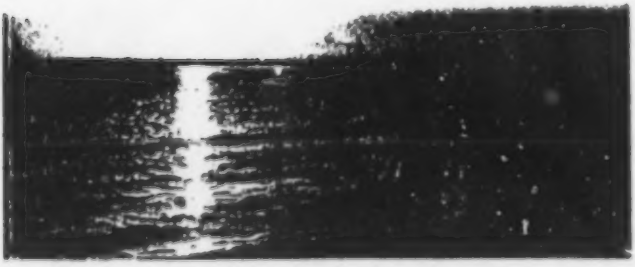
TROJANS'
TROJAN-ENZ'
are examples of these two types of dry condoms.

Are Condoms difficult to purchase?

No!... Pharmacies throughout the United States are the traditional and best source of quality brand condoms. By virtue of his or her experience as a trained member of the community health team, the pharmacist is best able to offer a wide selection of condom types and package sizes.



More and more pharmacies today have quality brand condoms on open display to make selection and purchase easier.



10

Are Condoms expensive?

The prices of condoms, of course, vary with the type of material used and any additional features added (i.e., whether it's lubricated or not).



However, when one considers the condom from the viewpoint of its effectiveness and the absence of side effects, the cost is rather minimal.

Are Condoms easy to use?

Yes! Modern pre-rolling and air-tight, individual unit packaging make them very easy to store...open...handle...and use.

Many couples today are incorporating the placement and use of the condom into their sexual foreplay... thus adding to the mutual enjoyment of sexual intercourse.





How safe are Condoms?

Ethical manufacturers require strict standards of strength, durability and reliability in manufacturing condoms (prophylactics). Each condom must be individually tested to assure a quality condom.

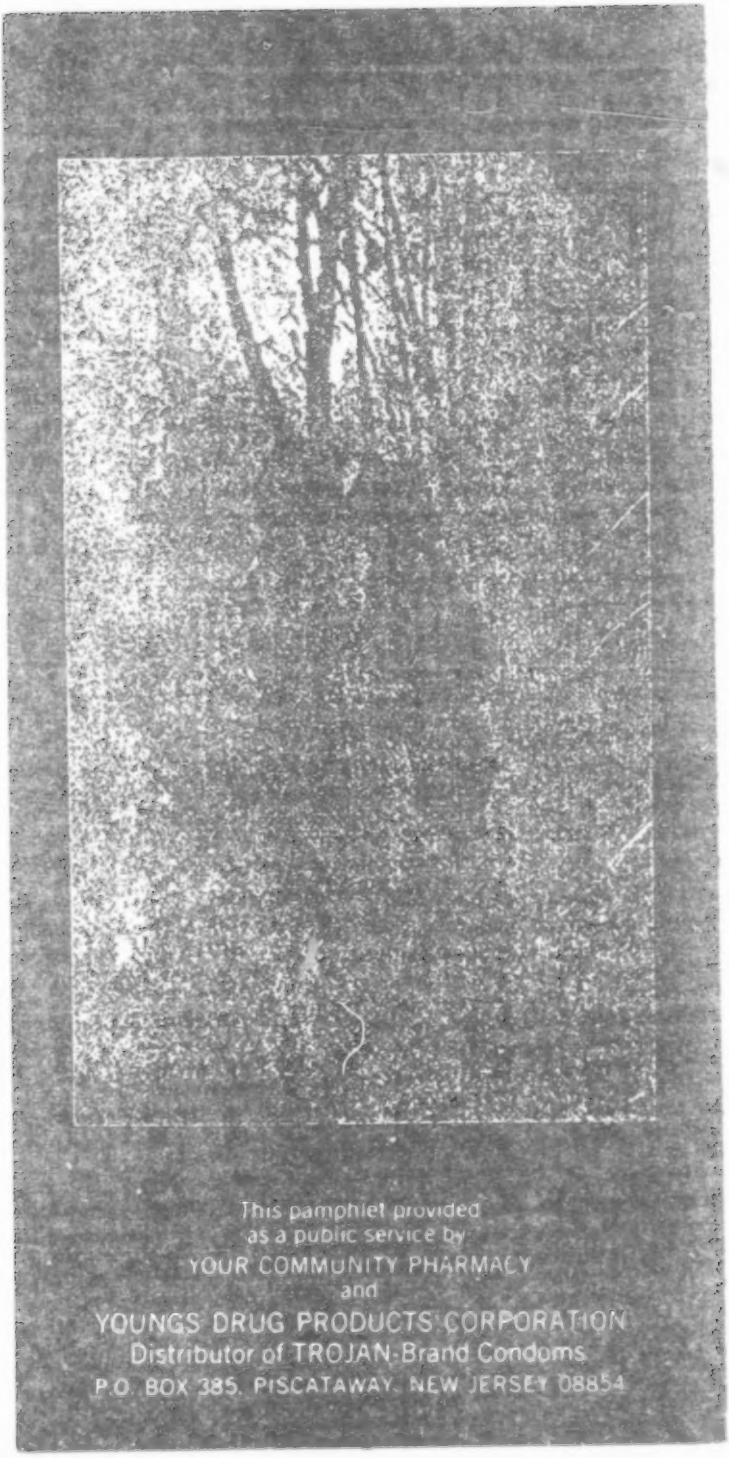
What type of usage, packaging and storage conditions provide maximum assurance of continuous Condom quality?

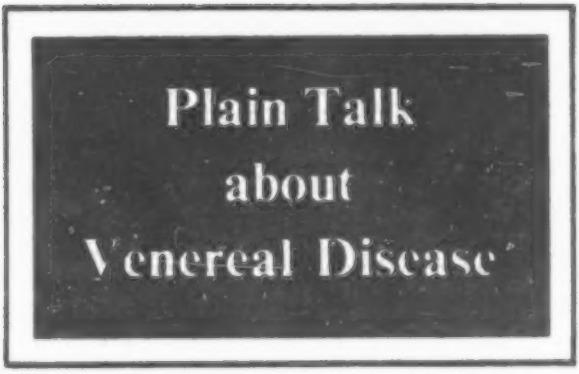
For maximum protection and assurance, make sure the condoms you purchase are:

- Individually sealed in air-tight containers
- Stored at room temperature... away from extreme heat or cold
- Used only once and then discarded

Further information about condoms may be obtained from physicians, clinics, Public Health authorities... and remember, your Community Pharmacist is the best source for information about... and the selection of... quality condoms.

PRINTED SEPTEMBER 1977


This pamphlet provided
as a public service by
YOUR COMMUNITY PHARMACY
and
YOUNGS DRUG PRODUCTS CORPORATION
Distributor of TROJAN-Brand Condoms
P.O. BOX 385, PISCATAWAY, NEW JERSEY 08854



OVER TWO AND ONE HALF MILLION VICTIMS EACH YEAR ... PREVENTION IS THE KEY TO VENEREAL DISEASE CONTROL.

©YDP Corp. 1978

2.

WHAT IS VENEREAL DISEASE?

Venereal Disease (VD) is the general name given to those diseases caused by organisms (germs) which are transmitted from persons who already have the disease to other persons either by sexual intercourse or by close body contact involving the sex organs, mouth and/or rectum.

MUST THERE BE THIS INTIMATE SEXUAL CONTACT TO SPREAD VENEREAL DISEASE?

Yes. The organisms causing these diseases can't live very long when exposed to light and air away from warm moist areas of the human body. Thus, there is little danger of becoming infected with Syphilis or Gonorrhea from public toilets, door knobs, drinking cups or eating utensils.

IS THERE MORE THAN ONE TYPE OF VENEREAL DISEASE?

Yes, but the two most common kinds of Venereal Disease are Syphilis and Gonorrhea.

ARE THERE OTHER NAMES FOR VENEREAL DISEASE BESIDES SYPHILIS AND GONORRHEA.

Yes. Syphilis is sometimes called *pox, lues, bad blood, siff* and *old Joe*. Gonorrhea is sometimes called *clap, strain, gleet, morning drop, "a dose"* and *"the whites"*.

IS VENEREAL DISEASE ON THE INCREASE?

Yes. Venereal disease now constitutes a public health emergency of the first order . . . killing, crippling and seriously endangering the mental and physical well-being of millions of people.

Gonorrhea is the leading reported communicable disease in this Country and Syphilis is third. *Venereal Disease strikes someone in the United States every 12 seconds . . . 5 new victims every minute!*

WHY IS INFECTIOUS VENEREAL DISEASE INCREASING SO RAPIDLY?

The answer is complicated, but here are just some of the contributing factors:

- **Many people have VD but don't recognize the symptoms.**
- **The contraceptive effectiveness of the "pill" has led to more frequent sexual relations without regard to the need for VD prevention.**
- **Lack of knowledge of what causes Venereal Disease.**
- **People who recognize symptoms and then get treated often fail to have all their sex contacts examined and treated.**
- **Casual attitude about the dangers of Venereal Disease.**
- **Shame and embarrassment of admitting and reporting a case of Venereal Disease.**
- **Failure to get prompt and proper treatment.**
- **Lack of funds for VD control programs.**
- ***People take very dangerous risks by not practicing Venereal Disease prevention such as using a quality prophylactic.***

WHO GETS VENEREAL DISEASE?

Venereal Disease can and does attack the young and old, the male and female, and people of all social classes. However, it most frequently attacks teenagers and young adults.

DOES ANY PERSON HAVE AN IMMUNITY TO VENEREAL DISEASE?

No. A person can be re-infected again and again . . . *and again!*

CAN SOMEBODY BE INFECTED WITH BOTH SYPHILIS AND GONORRHEA AT THE SAME TIME?

Yes.

HOW DANGEROUS IS VENEREAL DISEASE?

Many people die each year from untreated Syphilis. One in ten untreated victims of Syphilis will become permanently crippled heart victims. One in twelve afflicted will

develop Syphilitic insanity. One in one hundred will lose their eye sight. An overall rate of one in twenty-five of those afflicted will become in some way permanently crippled or incapacitated due to Syphilis. Untreated Gonorrhea can and does cause serious physical damage, such as sterility, heart trouble, arthritis and blindness . . . and the psychological problems that accompany these physical problems can be disabling.

CAN YOU TELL WHEN OR WHETHER ANOTHER PERSON HAS VENEREAL DISEASE?

No. There is no immediate or sudden change in general appearance and no definite pattern of symptoms to the uneducated eye.

WHAT ARE THE EARLY SYMPTOMS OR SIGNS OF SYPHILIS?

The first sign of infection is a single, painless sore where the germ has entered the body. This sore is called a Chancre (pronounced shank-er). It appears between two to six weeks after exposure to the infected person. This Chancre or sore will disappear even without treatment, but this only means that the disease has gone deeper into the body. *The disease is not cured.* The secondary stage of Syphilis which begins two to six months after the Chancre, can include skin rashes over all or part of the body, baldness, sore throat, fever and headaches. Even these will disappear without treatment, *but the disease is still in the body* . . . just waiting to create such "final" problems as crippling the nervous system, syphilitic insanity, heart disease and death.

WHAT ARE THE EARLY SYMPTOMS OR SIGNS OF GONORRHEA?

In the male, the first symptoms appear two to eight days after contact with the infected person and consist of a discharge of pus from the penis, painful inflammation in the urinary canal, which causes burning upon urination, and a frequency and urgency in urination. With females, Gonorrhea can go undetected. It may begin with a burning in the genital area, and there may or may not

be a slight vaginal discharge that could be attributed to some other routine problem. Untreated, the infection can spread into the reproductive tract. It may enter the abdomen and can cause peritonitis. After the acute infection subsides, it may be followed by a period of chronic infection which may result in sterility. Women can be infectious and be able to transmit the disease without even knowing they have it.

CAN VENEREAL DISEASE BE TRANSMITTED IN PREGNANCY TO THE UNBORN CHILD?

Gonorrhea can be transmitted to the eyes of the unborn child as it passes through the infected birth canal during delivery.

In pregnancy, transmission of the Syphilitic infection to the unborn child occurs through the infection of the mother . . . when the germs pass from the mother's blood stream into the blood stream of the unborn child. The child may be infected anytime from three months to the time of delivery. If the mother's infection is not treated in the first three months, the probability of still-birth is quadrupled . . . the possibility of infant death is almost doubled . . . and up to 80% of the remaining children suffer from congenital Syphilis depending on the duration of the mother's infection.

CAN VENEREAL DISEASE BE TREATED?

Yes! With prompt and proper diagnosis, the medical profession has available many drugs to treat Gonorrhea and Syphilis. The key to the treatment is the word, "PROMPT". Only a qualified physician can detect and treat Venereal Disease. Appropriate laboratory tests (a blood test for Syphilis and a smear or culture test for Gonorrhea) are essential in aiding the physician to detect Venereal Disease. Anyone the least bit suspicious of having Venereal Disease or suspicious of having intimate contact with a person infected with Venereal Disease should immediately contact their physician and/or Public Health Authorities.

6.

CAN VENEREAL DISEASE BE PREVENTED?

Yes!

HOW?

"When properly used, the most respected and time-proven *aid in the prevention* of Venereal Disease is the *Prophylactic* . . . also known as 'condom', 'skin', 'rubbers', 'safes', 'pros', 'etc.'."[1] Other methods of prophylaxis are thorough cleansing of the male and female sexual areas . . . douching by females and urination by males after sexual intercourse.

Of course selective sexual behavior, avoiding sexual contact with infected or possibly infected persons, is one of the best ways to prevent Venereal Disease.

IS THE PROPHYLACTIC (CONDOM) A CONTRACEPTIVE?

Yes, and has long been recognized as one of the most effective contraceptives.

WHEN AND HOW SHOULD THE CONDOM BE USED AS A PROPHYLACTIC AND/OR CONTRACEPTIVE?

For the condom to be an effective aid in the prevention of Venereal Disease or unwanted pregnancy *it must be* put on the erected penis before any sexual contact is made . . . right at the very start of any sexual activity.

DO OTHER CONTRACEPTIVE METHODS PREVENT VENEREAL DISEASE?

No! People must be made aware that other drugs, pills and devices used for contraception have no established value in preventing Venereal Disease. The prophylactic (Condom), when properly used, is the only

[1]Warren A. Ketterer, M.D., Chief, Venereal Disease Section, California State Department of Public Health.

device that is proven as *both a prophylactic and a contraceptive.*

ARE PROPHYLACTICS SAFE?

Ethical Manufacturers require strict standards of strength, durability, and reliability in manufacturing condoms. (prophylactics) Each condom must be individually tested to assure a quality condom.

WHERE ARE PROPHYLACTICS MOST EASILY OBTAINED?

Pharmacies throughout the United States have been the traditional source of quality-brand prophylactics. Unlike other distributors or vendors . . . the pharmacist, by virture of his experience and as a trained member of the community health team, is best able to offer the particular prophylactic to serve the individual need. The pharmacist "is a community leader who is trusted by the average citizen as a source of health related advice—second only to the physician."[2]

ARE PROPHYLACTICS DIFFICULT TO USE?

Absolutely not. Modern methods of producing, pre-rolling and packaging prophylactics make them very easy to open, handle and use.

DOES USING A PROPHYLACTIC REDUCE SENSITIVITY?

By offering the user a choice of modern prophylactic materials such as liquid latex (the material used in surgeons gloves) . . . natural animal membrane and special lubricants the whole range of required sensitivity levels are satisfied.

[2]Jesse L. Steinfeld, M.D., Surgeon General, Public Health Service, Department of Health, Education and Welfare.

8.

WHERE CAN FURTHER INFORMATION ON VENEREAL DISEASE BE OBTAINED?

This information is readily available from physicians, clinics and Public Health Authorities. And remember, your community pharmacist is the best source for medically-recommended products to aid in the prevention of Venereal Disease.

. . . and it is worth repeating,

VENEREAL DISEASE CAN BE PREVENTED.

"When properly used, the most respected and time-proven aid in the prevention of Venereal Disease is the Prophylactic . . . also known as 'condom', 'skin', 'rubbers', 'safes', 'pros', 'etc.'."[1] Other methods of prophylaxis are thorough cleansing of the male and female sexual areas . . . douching by females and urination by males after sexual intercourse.

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Contributed as a public service by:
YOUNGS DRUG PRODUCTS CORPORATION
P.O. Box 5, Piscataway, N. J. 08854
Distributor of TROJAN® brand prophylactics
Sold in pharmacies only

Printed in U.S.A.

Appellant's Reply Brief

Supreme Court, U.S.
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CLERK

No. 81-1590

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM F. BOLGER, ET AL., APPELLANTS

v.

YOUNGS DRUG PRODUCTS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

1. Virtually none of appellee's discussion addresses the question whether Congress may regulate *commercial* speech in the way prescribed by Section 3001(e)(2).[1] Instead, appellee's argument hinges on its repeated assertion — directly contrary to the finding of the district court — that all of its proposed mailings are "fully protected speech" (Br. 17; see, *e.g.*, Br. 12, 13, 15, 20, 25-31, 31-32). Appellee then contends that Section 3001(e)(2) is invalid because it is a content-based restriction on fully protected expression (*e.g.*, Br. 14-15, 18-25). We do not suggest that a prohibition comparable to Section 3001(e)(2) can be applied to fully protected, noncommercial speech. See Appellants' Br. 13-14 & n.6.[2] But appellee's contention that its proposed mailings

[1]It appears that appellee discusses this issue at only one point (Br. 37-38).

[2]For this reason, amicus curiae American Civil Liberties Union is entirely incorrect in asserting (Br. 6) that we "read[] Section 3001(e)(2) as applying to all unsolicited mailings that discuss contraceptives, including truthful and purely informational literature * * *."

are noncommercial is incorrect and leads to wholly unacceptable results.[3]

First, if appellee's contention were correct, its mailings apparently could not be regulated even if they contained misleading or false statements about prophylactic devices, birth control, and venereal disease. Compare *In re R.M.J.*, 455 U.S. 191, 200-201 n.12 (1982), with *Brown* v. *Hartlage*, No. 80-1285 (Apr. 5, 1982), slip op. 15-16. More important, appellee's contention, if accepted, would draw into question the viability of any distinction between commercial and noncommercial expression. This Court has always maintained that distinction, even while expanding the protections afforded to commercial expression. See, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 562-563 (1980); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976). Appellee does not explain why, if its mailings are fully protected speech, every advertiser could not similarly obtain full constitutional protection for its promotional materials.[4]

---

[3]It is not clear that this contention is properly before the Court. The district court's order specified that appellee could mail its advertisements only if it complied with certain restrictions. See J.S. App. 19a-20a. Those restrictions were predicated on the district court's view that appellee's mailings are commercial expression (see *id.* at 7a, 13a-16a), and there appears to be no justification for such restrictions if appellee's mailings are fully protected speech. Consequently, appellee's contention that the district court erred in holding that its mailings are commercial expression necessarily "would not dictate affirmance of that court's judgment * * * but rather elimination of" the restrictions it imposed (*Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970)). Since appellee did not cross-appeal, it appears to be precluded from making such a contention. See, *e.g.*, *Strunk* v. *United States*, 412 U.S. 434, 435, 437 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972).

[4]Because appellee proceeds from the premise that its proposed mailings are fully protected speech, it relies heavily (*e.g.*, Br. 27-28, 31, 35, 36-37), as it did in its Motion to Affirm (Mot. to Aff. 3, 7, 9, 10-11, 16,

a. At no point has appellee contended that its products are not "advertisements" within the meaning of Section 3001(e)(2).[5] In fact, appellee's complaint repeatedly refers to its proposed mailings as "advertisements" and "advertising." See, *e.g.*, J.A. 7, 11. The district court found that the mailings were "commercial solicitations" and "promotional materials" that appellee desired to mail because of its "commercial interest" (J.S. App. 7a, 8a n.5). Appellee's mailings are therefore well within this Court's definitions of commercial expression. Appellee does not deny that its mailings are "commercial activity" (*Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978)); *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979)); its decision to embark on its campaign of mass unsolicited mailings was a "marketing strategy" (J.S. App. 1a) carefully chosen after what appellee's marketing director described as "business discussions"

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19) on *Associated Students* v. *Attorney General*, 368 F. Supp. 11 (C.D. Cal. 1973). As we explained (Appellants' Br. 13-14 n.6), *Associated Students* dealt only with noncommercial expression, and the Postal Service has accepted the district court's decision and has amended its regulations accordingly. In fact, *Associated Students* affirmatively suggests that Section 3001(e)(2) is constitutional as applied to commercial speech. See 368 F. Supp. at 22-24.

[5]Amicus curiae American Civil Liberties Union makes such a contention. Br. 9-12. This contention is founded on a dichotomy, plainly false, between literature that "informs" and literature that "promotes". Specifically, the ACLU urges that "the term 'advertisement' * * * should not be construed to encompass informational literature, whose purpose and effect is to inform" (Br. 11). But advertisements are almost always designed to, and do, convey some information — indeed, that is the basis of their First Amendment protection — albeit information calculated to induce a consumer to buy a particular product.

In any event, appellee's complaint did not request a declaration that Section 3001(e)(2) is inapplicable to its proposed mailings (J.A. 11), and the ACLU's argument was not urged by appellee in the district court, in its motion to affirm, or in its brief in this Court, and was not relied upon by the district court. It is therefore not properly before this Court. See *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960).

(J.A. 14) and after appellee had decided that other marketing strategies were "insufficient to reach many of its potential customers" and had to be "supplement[ed]" (J.S. App. 1a). Thus, appellee's "sole purpose was to encourage members of the public to [buy its products] for * * * profit" (*In re R.M.J., supra,* 455 U.S. at 204 n.17).

b. Appellee nevertheless asserts that its proposed mailings are not commercial speech, apparently because, in appellee's view, any material that does not "contain[] *only* price or product information" (Br. 26, 30 (emphasis added)) is entitled to full constitutional protection. It is not clear what appellee means by "only price or product information": all the material appellee proposes to mail is related to the alleged virtues of condoms; the district court found that appellee's proposed mailings are all designed to induce consumers to buy its products; and each of the proposed mailings relentlessly promotes condoms. See Appellee's Br. App. 10, 11-24, 30-32. Each of the proposed mailings also prominently features appellee's brand name. See *id.* at 10, 11-12, 15, 18-20, 24, 32; Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine,* 44 U. Chi. L. Rev. 205, 230-232 (1976). Apparently appellee so dominates the market for condoms (see Appellee's Br. 3) that, in addition to promoting its brand name products, appellee also finds it profitable to promote condoms generally as opposed to other forms of birth control; but that circumstance scarcely entitles appellee's promotional literature to greater First Amendment protection.

Moreover, appellee's suggestion that "linking commercial messages with informational or editorial materials which pertain to a public debate is * * * a sufficient basis for a grant of full First Amendment protection" (Br. 29) is mischievous. That approach would enable any advertiser to escape regulations properly applied to commercial speech

by interweaving a discussion of a related public issue with its commercial promotions. See, *e.g.*, *Valentine* v. *Chrestensen*, 316 U.S. 52, 55 (1942) ("[E]very merchant who desires to broadcast advertising leaflets * * * need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command."). As the Court has recognized, some inquiry into a speaker's intent or the commercial function of the particular expression is necessary to avoid this danger. See, *e.g.*, *In re R.M.J.*, *supra*, 455 U.S. at 204 n.17; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 563 n.5. Compare *Ohralik* v. *Ohio State Bar Association*, *supra*, with *In re Primus*, 436 U.S. 412 (1978).

2. Appellee also contends (*e.g.*, Br. 11, 12, 17-25) that Section 3001(e)(2) is a content-based restriction on expression, presumably because it deals only with advertising about contraceptives. But as we have explained (Appellants' Br. 21-24), Section 3001(e)(2) is not an "attempt by the State to manipulate the choices of its citizens * * * by depriving the public of the information needed to make a free choice" (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 574-575 (Blackmun, J., concurring)). Moreover, a regulation of commercial expression that applies only to advertising for one product or service cannot be regarded as a suspect, content-based restriction that requires heightened scrutiny. See Appellants' Br. 21-22 n.10. Any other view would lead to implausible results: surely a legislature need not apply the same regulations to advertising for groceries as it does to advertising for used cars, or treat advertising by doctors identically to advertising for restaurants. Contraception is a peculiarly intimate and personal subject about which individuals — particularly parents deciding how to educate their children — have strong views. See, *e.g.*, *Whalen* v.

Roe, 429 U.S. 589, 599-600 (1977); *Griswold* v. *Connecticut*, 381 U.S. 479, 484-486 (1965); *Carey* v. *Population Services International*, 431 U.S. 678, 709-710, 712 (1977) (Powell J., concurring). It is precisely for this reason that personal decisions concerning contraception have a special constitutional status, and it follows that unsolicited advertising for contraceptives presents special concerns — having to do with privacy and the relationship between parents and children (see Appellants' Br. 24-33) — that Congress may legitimately take into account.

3. Appellee repeatedly attacks Section 3001(e)(2) as "the product of the Victorian anti-vice campaign of Anthony Comstock * * * intended to restrict speech which Comstock viewed as immoral" (Br. 11; see Br. 21-25, ACLU Am. Br. 5). In fact, Section 3001(e)(2) was enacted in 1971, when Congress, " 'reapprais[ing]' " restrictions on mailed literature concerning contraception and abortion, and explicitly "[r]ecognizing that the use of contraceptive devices is a matter of individual choice for each citizen" (116 Cong. Rec. 20630 (1970) (remarks of Rep. Byrnes) (quoting the Postmaster General)), repealed a statute that prohibited the mailing of any literature dealing with contraceptives — commercial or noncommercial, solicited or unsolicited — and replaced it with Section 3001(e)(2).

Far from reflecting outmoded attitudes of another era, the restriction imposed by Section 3001(e)(2) was the deliberate choice of a modern Congress concerned with the relevant constitutional provisions and the values underlying them; that choice is therefore entitled to unusually great deference. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64, 74-75 (1981). And far from restricting the free flow of information about contraception, Congress in 1971 swept almost every restriction on the distribution of contraceptive information, leaving intact only the one minimal limitation embodied in Section 3001(e)(2). That restriction affects only what is

commonly called junk mail, and it does not prevent any willing recipient from obtaining any advertisement.[6]

Moreover, as we explained in our opening brief (Br. 19, 34), the only effect of Section 3001 (e)(2) is to impose on advertisers — who are, presumably, already engaged in continual mass mailings at bulk rates — the slight burden of conducting a pre-mailing to identify their willing audience. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 135-136 (1981) (Brennan, J., concurring).

At the same time, Section 3001 (e)(2) gives parents and other addressees a measure of protection, in their homes, against an intrusive form of commercial solicitation on a sensitive subject.[7] Appellee's somewhat cavalier response to those concerns is that parents who do not want unsolicited contraceptive advertisements to fall into the hands of their children can obtain locked mailboxes (Br. 34 n.26; see also ACLU Am. Br. 20). But appellee does not explain why it was unreasonable for Congress to place the minimal burden of conducting a pre-mailing on it, instead of placing the burden on parents and other recipients to exclude unwanted materials from their homes.

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[6]Because Section 3001(e)(2) prohibits only unsolicited advertisements, appellee is plainly incorrect in asserting (Br. 35) that "[a]dults as well as children are barred from receiving [its] mailings." Appellee may send its advertisements to anyone who wishes to receive them.

[7]Appellee relies on *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). But the statute invalidated in *Bigelow* made it a crime "by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion" (*id.* at 811); on its face, that statute, unlike Section 3001(e)(2), was an effort to influence and limit citizens' choices in a constitutionally protected area. Moreover, the *Bigelow* statute was far broader than the limited restriction imposed by Section 3001(e)(2), and in *Bigelow* "[t]here was no possibility that [the advertiser's] activity would invade the privacy of other citizens" or that "[o]bservers would * * * have the advertiser's message thrust upon them as a captive audience" (421 U.S. at 828).

4. Appellee and amici also suggest that because the interests that support Section 3001(e)(2) are not explicitly identified in the legislative history, we cannot properly advance them in the statute's defense. See, *e.g.*, Appellee's Br. 21, 24; ACLU Am. Br. 14-15; Pl. Par. Am. Br. 13.[8] Indeed, appellee and amici appear to assume that because Congress did not articulate its reasons with specificity, the Court should conclusively presume that Congress acted for illegitimate reasons. See Appellee's Br. 24-25; ACLU Am. Br. 14-15.

We know of no rule that Congress, like an administrative agency, must explain its actions in a fashion suitable for judicial review. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980); Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 105 (1966). Section 3001(e)(2) is obviously not the product of legislative inadvertence or "thoughtless[ness]" (*Schweiker* v. *Wilson*, 450 U.S. 221, 239 (1981) (Powell J., dissenting)); the interests supporting it are "implicit in the statutory scheme itself" (*id.* at 244), especially in view of Congress's simultaneous repeal of all other restrictions on the mailing of contraceptive advertisements in 1971. Similarly, the fact that no member of Congress placed in the legislative history evidence suggesting the intrusiveness of unsolicited advertising for contraceptives (see, *e.g.*, Appellee's Br. 38; ACLU Am. Br. 7, 18; Pl. Par. Am. Br. 6, 9) is surely immaterial; "the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor" (Cox, *supra*, 80 Harv. L. Rev. at 105; see *e.g.*, *Metromedia, Inc.* v.

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[8] "Pl. Par. Am. Br." refers to the brief for Planned Parenthood *et al.* as amici curiae.

City of San Diego, 453 U.S. 490, 509 (1981) (plurality opinion)). Particularly when "the people's representatives" have made a judgment on such common sense subjects as the offensiveness of a particular form of advertising and the extent to which it will interfere with parents' efforts to instruct their children, there is no reason for the Court to discount that judgment on the basis of marketing surveys and the speculations of private parties (see, *e.g.*, Appellee's Br. 18 n.10; Pl. Par. Am. Br. 10-11).[9]

5. Appellee and amici repeatedly emphasize the "underinclusiveness" of Section 3001(e)(2), but they do not explain why this supposed defect should be fatal to the statute. See, *e.g.*, Appellee's Br. 12, 18-20; ACLU Am. Br. 6-8; Pl. Par. Am. Br. 16-17. Appellee and amici assert, for example, that the alleged underinclusiveness of Section 3001(e)(2) shows that Congress did not truly intend to promote the objectives of preventing interference with the relationship between parents and children and preventing offensive material from entering the home. But Section 3001(e)(2) is far more underinclusive with respect to the objective appellee and amici attribute to Congress, that of indiscriminately suppressing expression about contraception. In addition, even if some noncommercial expression presents the same dangers as the expression proscribed by Section 3001(e)(2) — and, as we explained in our opening brief (Br. 28-29), Congress could reasonably have believed otherwise — this Court's decisions establish that Congress can "cho[ose] to value" noncommercial expression, or other forms of commercial expression, more highly than the commercial

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[9]It is also unclear how appellee and amici (*e.g.*, Pl. Par. Am. Br. 9) can assert both that Congress — presumably reflecting its constitutents' sentiments — enacted Section 3001(e)(2) out of antipathy to expression about contraception and that the vast majority of citizens do not object to such expression.

expression barred by Section 3001(e)(2). See, *e.g.*, *Metromedia, Inc.* v. *City of San Diego, supra,* 453 U.S. at 511-512; Appellants' Br. 22 n.10. Indeed, on some occasions a legislature *must* exempt noncommercial expression from a prohibition it may lawfully apply to commercial expression that presents no greater threat to the government's regulatory interests. See *Metromedia, Inc.* v. *City of San Diego, supra,* 453 U.S. at 513-514, 520-521.

Finally, appellee repeatedly asserts (Br. 12, 20, 37) that an organization with no commercial interest could mail the same materials that appellee is prohibited from mailing. In practice, there is little likelihood that a noncommercial organization would mail literature that promotes appellee's products, both directly and subtly, in the way appellee's proposed mailings do. See page 4, *supra.* The reason a noncommercial organization might, in theory, be able to mail this literature is that the Postal Service — in an effort to provide the specificity and narrow focus so desirable when First Amendment rights are at stake — has limited the application of Section 3001(e)(2) to mailings in which the sender has a commercial interest. See Appellants' Br. 3. Appellee does not explain why this limitation somehow makes Section 3001(e)(2) inconsistent with the First Amendment.

6. Appellee repeatedly insists (*e.g.*, Br. 4, 24) on the tastefulness of its advertisements. While we would note that there is, at the least, room for reasonable disagreement about whether appellee's advertisements are "tasteful,"[10] it

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[10]Appellee is incorrect in suggesting (Br. 4 n.3) that we conceded in the district court that its proposed mailings are tasteful. We have consistently declined to enter into a dispute over the tastefulness *vel non* of these particular advertisements, because we consider that issue irrelevant to the constitutional question.

is pointless to dispute the issue; plainly the First Amendment cannot embody a distinction between expression that a judge considers tasteful and expression that he considers tasteless, and if Section 3001(e)(2) is invalid as applied to "tasteful" mailings, the most tasteless advertisements for contraceptives must also be delivered by the Postal Service to unwilling recipients.

For these reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1983

DOJ-1983-01

Amicus Brief

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No. 81-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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v.

YOUNGS DRUG PRODUCTS CORP.,
Appellee.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION

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BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit membership organization dedicated to the promotion and defense of the fundamental liberties guaranteed in the Bill of Rights, including those protected by the First Amendment. The ACLU has frequently appeared in this Court and in other courts, as counsel for the parties and as amicus, in cases challenging governmental actions that threaten per-

sonal liberties generally, and First Amendment rights in particular.

This case involves a federal statute that, while serving no legitimate governmental purpose, curtails the free flow of truthful information on a subject of great public and private importance. The statute also discriminates against the First Amendment rights of commercial concerns by allowing non-profit organizations to make precisely the kind of unsolicited mailings it forbids to commercial entities.

The ACLU has an organizational interest in seeing that these First Amendment violations are rectified. We are therefore filing this brief, with the consent of the parties.[1]

INTRODUCTORY STATEMENT

This case involves 39 U.S.C. § 3001(e)(2) (1976), which bans the mailing of every "unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception . . . ."[2] The case comes to this

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[1] The parties' letters of consent have been filed with the Clerk.

[2] Section 3001(e)(2) exempts from the ban advertisements mailed to contraceptive manufacturers or dealers, or to medical personnel or institutions, whether the advertisement is alone or accompanies sample contraceptives. In addition, the statute provides that an advertisement is not "unsolicited" if it is contained in a publication bought or requested by the recipient.

Violation of Section 3001(e)(2) carries heavy criminal penalties. *See* 18 U.S.C. § 1461 (1976), which states, in relevant part:

> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by . . . section 3001(e) of title 39 to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Court on the Government's direct appeal from a decision by a single-judge United States district court holding the statute unconstitutional. *Youngs Drug Products Corp. v. Bolger*, 526 F. Supp. 823 (D.D.C. 1981).

While we do not subscribe to the lower court's analysis and approach in all respects, we believe Section 3001(e)(2) is clearly unconstitutional. For the reasons stated in this brief, this Court should hold (1) that Section 3001(e)(2) does not apply to informational literature concerning contraceptive use because such literature is not "advertising" within the meaning of the statute, and (2) that Section 3001(e)(2) is unconstitutional as applied to "advertisements" because it significantly curtails speech without furthering a legitimate governmental interest.

SUMMARY OF ARGUMENT

Section 3001(e)(2) is a hundred year old content-based ban on speech. As the Government construes it, the statute prohibits all unsolicited mailings, whether advertisements or informational literature, that are made by persons having a commercial interest in contraceptive products and that discuss the availability, use, or benefits of contraceptives. The statute thus significantly interferes with the free flow of accurate and valuable information about the use and availability of contraceptives to the large class of persons who, although they may not actively solicit such mailings, are willing to receive them and may benefit from them.

The dissemination of truthful informational literature about contraceptives cannot constitutionally be restricted, because it constitutes valuable speech on issues of great public importance. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 533-535 (1980);

Carey v. Population Services International, 431 U.S. 678 (1977). In addition, since, as the Government concedes, the statute permits unsolicited informational mailings about contraception by persons that have no commercial interest in the products, construing it so as to prohibit similar mailings by entities with a commercial interest would raise serious constitutional problems of discriminatory treatment and under-inclusiveness.

In any event Section 3001(e)(2) does not reach informational literature. By its terms, the statutory ban is limited to unsolicited "advertisement[s]." Nothing in the language or legislative history warrants extending the statute beyond its plain meaning to encompass truthful and purely informational mailings as well as "advertisements."

Finally, Section 3001(e)(2) is unconstitutional even as applied to "advertisements." It cannot be justified by the purported governmental interests advanced in the Government's brief. Those interests are unsupported by the legislative history, are neither permissible nor substantial enough to justify legislation suppressing speech, and are not effectively furthered by the statute. Moreover, there are less restrictive ways of advancing the asserted interests than the suppression of commercial speech. The statute is therefore unconstitutional *in toto*.

ARGUMENT

It is important to note, at the outset, what this case does not involve: It does not involve any issues of obscenity or pornography;[3] it presents no issues of false or misleading claims;[4] and it involves no dispute as to the public and private importance of the subject of contraceptive use.[5]

What this case does involve is the constitutionality of a statute—39 U.S.C. § 3001(e)(2)—that, by banning unsolicited mailings by commercial entities, restricts the flow of free, truthful information concerning the availability, use, and known health benefits of nonprescriptive contraceptives. Section 3001(e)(2) is a relic from a 19th century criminal code provision whose purpose was to suppress literature and articles once deemed immoral. Particularly as now construed by the Government, Section 3001(e)(2) so seriously violates First Amendment values that it should be held unconstitutional.

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[3] As the court below found, "not only are the materials [at issue in this case] not obscene, there is no suggestion that they treat the subject matter of the desirability and availability of contraceptive products in a pandering, suggestive or graphic way." 526 F. Supp. at 824.

[4] The Government has not suggested that anything in appellee's mailings is untruthful or misleading, either as to the benefits of contraceptive use generally or as to the merits of appellee's particular products.

[5] Information about contraceptives is important to family planning decisions, as this Court recognized in *Carey v. Population Services International*, 431 U.S. 678 (1977). Information about contraceptives also substantially promotes public and private health. A recent study concluded that "[t]he use of condoms provides considerable protection against sexually transmitted diseases." Sherris, "Update on Condoms—Products, Protection, Promotion," Johns Hopkins University Population Reports, Sept.-Oct. 1982 at H-128. And another recent study demonstrated that the use of barrier-method contraceptives (the kind appellee manufacturers and sells) provides a statistically significant level of protection against pelvic inflammatory disease ("PID") in women. Kelaghan, *et al.*, "Barrier-Method Contraceptives and Pelvic Inflammatory Disease," 248 J.A.M.A. 184 (July 9, 1982).

I. THE MAILING OF TRUTHFUL INFORMATIONAL LITERATURE ON THE BENEFITS AND USE OF CONTRACEPTIVES CANNOT CONSTITUTIONALLY BE PROHIBITED AND SECTION 3001(e)(2) DOES NOT IN FACT PROHIBIT SUCH MAILINGS.

A. The Mailing of Truthful Informational Literature on the Use, Benefits and Availability of Contraceptives Cannot Constitutionally Be Prohibited.

The Government reads Section 3001(e)(2) as applying to all unsolicited mailings that discuss contraceptives, including truthful and purely informational literature that tells the recipient about the use, benefits and availability of contraceptives. So read, Section 3001(e)(2) cannot stand, because it violates the First Amendment.

First of all, speech that conveys truthful information on important social issues—such as family planning and the prevention of venereal disease—is entitled to paramount First Amendment protection, whether or not the speech may be economically motivated. *Carey v. Population Services International*, 431 U.S. 678 (1977); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *see also Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980). Curtailment of such speech by a ban on unsolicited mailings in the absence of a compelling justification is therefore unconstitutional. *Id.*[6]

Equally serious constitutional problems result from the fact, which the Government concedes, that Section 3001(e)(2) does not reach informational mailings by non-commercial organizations promoting or discussing con-

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[6] The justifications advanced by the Government for Section 3001(e)(2) are neither legitimate nor substantial, let alone compelling. *See* Sec. II-A *infra*.

Absent a compelling governmental interest, the statute would, of course, be unconstitutional if it banned truthful unsolicited mailings by non-commercial organizations. *See Associated Students v. Attorney Gen.*, 368 F. Supp. 11 (C.D. Calif. 1973).

traceptive use.[7] Gov't Br. 9, 13-14, 28. Thus, under the Government's construction, the statute allows non-commercial organizations to mail precisely the kind of unsolicited informational literature that it prohibits appellee from mailing.

This discrimination undermines the Government's own argument that Congress enacted Section 3001(e)(2) in order to eliminate outside influences that might hinder parents' efforts to teach their children about contraception. Gov't Br. 25. Evidently recognizing that the statute would be substantially underinclusive in light of the claimed rationale, the Government attempts to justify the discrimination by suggesting that Congress could reasonably have concluded that unsolicited literature sent by commercial entities is likely to be "more of a potential interference with parents' efforts to instruct their children" than similar unsolicited literature sent by non-commercial entities. Gov't Br. 29. But there is not the slightest evidence in the legislative history to suggest that Congress did in fact reach that conclusion, or that it even considered the question. Nor has the Government offered any evidence to support the assertion that such a conclusion can reasonably be drawn. As virtually everyone with a mailbox is well aware, non-commercial organizations can be every bit as forceful and persistent as commercial entities in making unsolicited mailings.

Thus, under the Government's construction, Section 3001(e)(2) is both substantially underinclusive and discriminatory.[8] It curtails First Amendment rights of com-

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[7] Presumably the Government would also exempt from the statutory ban unsolicited informational mailings ("public service messages") about contraceptives by for-profit firms that have no commercial interest in contraceptives (for example, oil companies). Their interest in such mailings is indistinguishable from that of non-commercial organizations.

[8] *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

mercial entities[9] to provide truthful and important information to the public, while exempting other organizations from the restriction—even though their speech is indistinguishable in all material respects, and even though the exemption undercuts the argument in support of the restriction in the first place.[10]

The Government's construction leads, moreover, to anomalous results. Under that construction, appellee may not make unsolicited mailings of informational literature discussing the benefits of contraceptive use, while organizations having no commercial interest in contraceptives may make them. Appellee may, however, contribute money to one of those organizations (say, the Planned Parenthood League) with the aim of having that organization make unsolicited mailings of the same kind of informational literature. Such mailings would not be prohibited by Section 3001(e)(2). Yet their impact would be precisely the same—in intrusiveness into the parent-child relationship, as well as in informational and educational value—as would have been the case if appellee had mailed the literature itself.

In short, construing Section 3001(e)(2) to encompass purely informational material would ban speech based solely on the identity of the speaker. Such a construction

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[9] It is, of course, too late to argue that First Amendment freedoms do not extend to corporations or other commercial entities. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

[10] This Court has repeatedly held that a statute that imposes a burden on a protected right may be permissible even if it does not perfectly accomplish its asserted purpose. However, the fact that a statute intended to accomplish a compelling purpose by prohibiting some conduct by a certain group of people does not apply to identical conduct by another group—*i.e.*, is substantially underinclusive—suggests strongly that the statute's asserted interest or purpose is merely a pretext. *See, e.g., Carey v. Brown*, 447 U.S. 455, 470-71 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975). That is exactly the case here.

cannot withstand First Amendment scrutiny. *See First National Bank of Boston v. Bellotti*, 435 U.S. at 777, "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ."

B. Section 3001(e)(2) Does Not Prohibit the Mailing of Informational Literature Concerning Contraceptives.

By its express terms, Section 3001(e)(2) prohibits the mailing only of "advertisements." The Government and the court below, however, view the statute as also prohibiting the unsolicited mailing of informational literature by persons with a commercial interest in contraceptive products, even if that literature does not promote the sale of particular products but rather discusses the benefits of contraceptive use generally. Gov't Br. 14-15; 526 F. Supp. at 827 n.5. Thus, for example, under the Government's construction, Section 3001(e)(2) bars appellee from mailing (except to persons who have previously requested it) appellee's informational pamphlets discussing venereal disease and the use of barrier contraceptives to prevent it. Brief for Appellee, Appendix ("App.") at 25-32.[11]

The Government's construction of the statute is wrong. The plain language of Section 3001(e)(2) limits the statute's reach to "advertisement[s]." Nothing in that language suggests that the statute is also intended to prohibit the mailing of informational literature that provides truthful discussion of important public health issues and that does not promote, or promotes only incidentally, the mailer's particular products. Indeed, the statutory exception for "advertisement[s] . . . contained

[11] Similarly, under the Government's construction, Section 3001(e)(2) also bars appellee from mailing informational pamphlets discussing the use and benefits of barrier contraceptives that also describe appellee's products. Brief for Appellee, App. at 13-24.

in a publication" bought or requested by the recipient reinforces the conclusion that Congress intended to give the term "advertisement" its usual, common sense meaning of promotional, rather than informational, materials.[12]

The distinction between "advertisement[s]" and other literature sent through the mails is solidly grounded in the history of Section 3001(e)(2).[13] The predecessor statute, as originally enacted in 1873, reached, by its express terms, not only "advertisements" but also every "card, circular, book, pamphlet, . . . or notice of any kind giving information" about contraception.[14] Subsequent recodifications of the statute retained the same language, thereby continuing to use "advertisement" as a term of limited, rather than all-encompassing, scope. When in 1970 Congress narrowed the ban to cover only "advertisement[s]," Congress nowhere manifested an intent to use that term any differently from the way it had been used during the preceding 100 years. To now extend the term "advertisement" to encompass every "card, circular, book, pamphlet, . . . or notice of any kind giving information" about contraception would be to adopt an interpretation inconsistent with the statutory terms as Congress actually used them over a long period of time.

This Court, as well, has recognized that the term "advertisement" carries a specific meaning. Indeed, in *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916), a case contemporaneous with the early years of the predecessor statute to Section 3001(e)(2), the Court stated, unanimously that:

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[12] It is especially important not to expand a statute beyond its plain meaning where, as here, violation carries heavy criminal penalties. *See* n.2 *supra*; *United States v. Braverman*, 373 U.S. 405, 408 (1963); *United States v. Resnick*, 299 U.S. 207, 209-10 (1936).

[13] We discuss the history of Section 3001(e)(2) at greater length below.

[14] Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873).

> "Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold . . . ." *Id.* at 365.

For the foregoing reasons, the term "advertisement" as used in Section 3001(e)(2) reaches only promotional literature the primary purpose of which is to propose or encourage transactions or to persuade consumers to buy particular products or services. It should not be construed to encompass informational literature, whose purpose and effect is to inform.[15]

The Government does not dispute this conclusion. Nevertheless, the Government assumes that the term "advertisement" reaches informational literature, for the Government would lump all of appellee's mailings, of whatever nature, within the ban of Section 3001(e)(2). Gov't Br. 14-15.

The Government's assumption is unfounded. Indeed, the Government's brief contains no analysis or discussion of the scope of the statutory term "advertisement." To be sure, the Government attempts to suggest, through selective quotations from this Court's prior opinions, that appellee's informational mailings are merely "advertising that links a product to a current public debate" [16] and thus constitute commercial speech. But this attempt misses the mark. The real question is not whether such informational mailings constitute commercial speech (they

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[15] A three-judge district court reached a similar conclusion for much the same reasons. *Associated Students v. Attorney Gen.*, 368 F. Supp. 11, 24 (C.D. Cal. 1973) (rejecting the Post Office's attempt "to expand the term 'advertisement' . . . beyond [its] commercial sense").

[16] Gov't Br. 15, quoting *Central Hudson*, 447 U.S. at 563 n.5. The Court's discussion in *Central Hudson*, however, in fact manifested a recognition of the distinction between advertisements (*i.e.*, promotional mailings) and informational literature. *See id.*

do not), but rather whether they are "advertisements" within the meaning of Section 3001(e)(2) in the first place. On that crucial question, to which the correct answer is no, the Government's brief is silent.

II. THE BAN ON UNSOLICITED MAILINGS IN SECTION 3001(e)(2) IS UNCONSTITUTIONAL EVEN IF LIMITED TO ADVERTISEMENTS.

Limiting Section 3001(e)(2) so that it reaches only "advertisements" will avoid raising the especially severe constitutional problems discussed above. But even as so limited, the statute is constitutionally infirm, since it still restricts truthful speech on matters of great public importance.

Decisions whether to use contraceptives, what kind to use, and how to obtain access to them bear directly upon some of the most personal and private choices—those related to childbearing. *Carey v. Population Services International*, 431 U.S. 678, 687-89 (1977). For this reason advertisements for contraceptives enjoy the status of fully protected speech.[17] But we need not rest our argument on that proposition alone, for the restriction Section 3001(e)(2) imposes on contraceptive advertising is unconstitutional even if—contrary to the plainly mixed nature of appellee's mailings which do far more than propose commercial transactions—such advertising is considered to be merely commercial speech.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), this Court articulated the standard for determining the constitutionality of a statute that prohibits truthful and otherwise lawful commercial speech:

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[17] *See Bigelow v. Virginia*, 421 U.S. 809 (1975); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). This is essentially the test urged in the concurrence for three members of the Court in *Central Hudson*, 447 U.S. at 557-59 (Blackmun, J. concurring), and the test Amicus urges on the Court here.

> "If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. . . . Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* at 564.

Section 3001(e)(2) should be struck down, because the Government has not carried its burden of showing that even this test is satisfied.[18]

A. Section 3001(e)(2) Does Not Serve Any Substantial or Legitimate Governmental Interest.

The Government has advanced two purported interests underlying Section 3001(e)(2)—first, that Congress has an interest in preventing advertisements for contraceptives from falling into children's hands against parental wishes, Gov't Br. 24-25; and second, that Congress has an interest in protecting all recipients of mail from advertisements that they may find "offensive." Gov't Br. 30. Neither reason constitutes a proper or sufficient justification for the restriction on protected commercial speech.

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[18] The party that seeks to uphold a restriction on commercial speech bears the burden of justifying the restriction. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570 (1980); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

1. *The Statute Cannot Be Justified as a Device for Eliminating a Source of Potential Interference with the Parent-Child Relationship.*

The Government seeks to justify Section 3001(e)(2) on the ground that it "directly promotes the Government's substantial interests in preventing families from receiving unwanted advertisements that may be offensive and that may, against parents' wishes, fall into the hands of children." Gov't Br. 24. According to the Government, Congress sought, by enacting Section 3001(e)(2), to eliminate "direct interference with the parental guidance that is especially appropriate in this sensitive area of child development." [19]

However plausible this argument might be if there were anything in the legislative history to support it, the argument is a creation cut from whole cloth. The Government itself acknowledges that "Congress did not announce these interests in the legislative history when it enacted Section 3001(e)(2)." Gov't Br. 24. Yet the Government goes on to assert, without support, that "it is clear Congress had such objectives in mind." *Id.*

In fact, it is clear that Congress did *not* have such objectives in mind. The prohibition in Section 3001(e)(2) has been a part of Federal statutory law for over 100 years. It was first enacted in 1873,[20] as part of an act designed "for the suppression of trade in and circulation of obscene literature and articles of immoral use." [21] As enacted, the ban applied to the mailing of all advertisements for contraceptives, whether solicited or unsolicited.

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[19] Gov't Br. 25, quoting *Carey*, 431 U.S. at 708 (Powell, J., concurring). Ironically, Justice Powell's point was that a *ban* on contraceptive advertisements interferes with "parental guidance." That is just the opposite of the point the Government seeks to make.

[20] Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873).

[21] Cong. Globe, 42d Cong., 3d Sess. 2004 (1873) (statement of Representative Merriam).

The prohibition was recodified in 1888 [22] and again in 1909.[23] The last recodification before 1970 was in 1948, when the prohibition became part of 18 U.S.C. § 1461.[24] The 1948 provision, captioned "Mailing Obscene or Crime-Inciting Matter," was "enacted to prevent the mails from being used to corrupt the public morals." [25] During this entire period, the legislative history is devoid of even a hint indicating that Congress' objective was to eliminate unwanted "interferences" with parents' ability to guide their children's development. Congress' expressed purpose was much less subtle—to legislate public morals.

In 1970, Congress revised 18 U.S.C. § 1461, whose blanket prohibitions against mailing all contraceptives and advertisements for them were by then clearly unconstitutional in light of *Griswold v. Connecticut*, 381 U.S. 479 (1965). Those blanket prohibitions were stricken, and were replaced by the narrower bans on unsolicited mailings now found in Section 3001(e). Once again, there was not a single word to suggest that Congress' objective was to protect the parent-child relationship. The only conclusion fairly possible is that Congress was simply trying to preserve the last remnants of its earlier, purely suppressive, legislation.

2. *The Possibility that Some Persons May Be Offended Is Not a Constitutionally Permissible Justification for Banning Truthful, Nonobscene Speech.*

The Government also attempts to justify Section 3001(e)(2) as a device for protecting recipients of mail from material that, while truthful and not obscene, may

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[22] Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 496.

[23] Pub. L. No. 60-350, ch. 321, § 211, 35 Stat. 1129 (1909).

[24] Pub. L. No. 80-772, 62 Stat. 768 (1948) (codified in 18 U.S.C. § 1461 (1976)).

[25] S. Rep. No. 113, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Ad. News 2210-11. (Amendment of § 1461 not involving contraceptives.)

nevertheless be "offensive" to some of them. Gov't Br. 30. But that effort cannot succeed.

The desire to shield citizens from truthful, nonobscene speech that might offend some of them is not a constitutionally permissible justification for banning speech.[26] On this point, it does not matter whether commercial or noncommercial speech is involved. In either case, this Court has "consistently held that the fact that protected speech may be offensive to some does not justify its suppression." [27] Indeed, the Court expressly stated in *Carey* that the contention "that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them" is "classically not [a] justification[] validating the suppression of expression protected by the First Amendment." *Id.*

Recognizing that its argument is "problematic," Gov't Br. 30, the Government suggests that the argument nevertheless has special force in this case, because (1) "when expression enters the home, its potential offensiveness is a proper reason for regulation," and (2) commercial speech is involved and "there is no danger that the expression is being restricted because Congress disagrees with an implicit message it conveys." *Id.* These suggestions have no merit here.

None of the cases cited by the Government stand for the proposition that "potentially offensive" speech may be indiscriminately banned by virtue of the fact that it

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[26] Even if the Government's desire to protect its citizens against speech they find "offensive" were a proper justification for restricting speech, Section 3001(e)(2) still could not be properly applied to the advertisements at issue in this case. There is nothing "offensive" about them. The court below found them to be "tasteful expressions," 526 F. Supp. at 824, and the Government has not disputed that characterization. If Section 3001(e)(2) were to apply to appellee's advertisements, its reach would obviously extend beyond its rationale.

[27] *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977).

"enters the home." [28] To the contrary, when the Court discussed potentially objectionable materials mailed to consumers' homes in utility bill envelopes, the Court pointedly noted that recipients who in fact find such materials objectionable may "escape exposure to [it] . . . simply by transferring the [material] from envelope to wastebasket." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 542. And the Court stated that a ban on such unsolicted mailings cannot be justified merely because the materials "may invade the privacy of households." *Id.* at 542 n.11.

The Government fares no better with its suggestion that Congress should have greater latitude to suppress here because commercial speech is involved. *See* Gov't Br. 30. The Court rejected that proposition in *Carey*,[29]

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[28] In particular, the Government is simply wrong in asserting that "[i]n *Consolidated Edison*, the Court considered the potential offensiveness of a utility's bill inserts to be a permissible justification for regulation." Gov't Br. 30 n.14. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541-42 & n.11. The Court nowhere so stated. To be sure, the Court assumed *arguendo* that "a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers . . . ." *Id.* at 541. But the Court never held, or even suggested, that the mailing of the bill inserts could constitutionally be banned for that reason. The Court's conclusion was to the contrary.

The Government's reliance on *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), is also misplaced. That case upheld 39 U.S.C. § 3008 under which an addressee may "giv[e] notice that he wishes no further mailings from that mailer." *Id.* at 737. Nothing in *Rowan* suggests that the Government may constitutionally bar access to all homes, offices and postboxes in advance, including those in which the mailing would be welcome or where the recipient has no objection to receiving it.

Pacifica Foundation, 438 U.S. 726 (1978), also does not support the Government's argument. As discussed below, that case involved a very different situation than this one. *See* Sec. II-C *infra*.

[29] 431 U.S. at 701 n.28.

a case that (like this one) involved the constitutionality of a ban on advertisements for contraceptives.

Finally, the Government is incorrect in stating that Congress did not enact Section 3001(e)(2) because of disagreement "with an implicit message" carried by the prohibited expression. As we have shown, the statute was purely suppressive in intent.

B. Even If the Interests Asserted by the Government Were Substantial, Section 3001(e)(2) Does Not Effectively Advance Them.

Even if the interests asserted by the Government were substantial, proper, and grounded in the legislative history, Section 3001(e)(2) would still be a constitutionally invalid restriction on truthful and lawful commercial speech. Such a restriction "must directly advance" the asserted governmental interest; it "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564. Section 3001(e)(2) fails this test.

Nothing in the legislative history, the record, or the Government's brief supports the Government's assertion that the mailing of unsolicited advertisements for contraceptives is likely to impede parents' ability to give their children guidance on this subject. Nor does common sense provide support for the assertion. It is hard to imagine how a pamphlet advertising contraceptives, or a drugstore flier listing contraceptives and their prices between baby powder and Kodak film,[30] would cause "interference with the lines of communication between parents and children." Gov't Br. 25.

Furthermore, Section 3001(e)(2)'s ban on unsolicited advertisements is plainly ineffective as a way of shielding children from knowledge that their parents do not want them to have. Under a proper construction of the stat-

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[30] *See* Brief for Appellee, App. at 10.

ute, unsolicited informational literature—materials that are not advertisements—concerning contraceptives may be mailed by anyone. Moreover, contraceptives are today openly displayed and promoted at drugstores into which children may freely enter. Section 3001(e)(2) thus does not prevent children from receiving access to the knowledge from which the statute is supposed to insulate them.

C. Even If the Interests Asserted by the Government Were Substantial and Were Effectively Advanced by Section 3001(e)(2), There Are Less Restrictive and Equally Effective Ways of Advancing Them.

Section 3001(e)(2) also fails the final prong of the *Central Hudson* test for the constitutionality of restrictions on commercial speech. Even if the purported governmental interests advanced by the Government were substantial, they "could be served as well by a more limited restriction on commercial speech . . . ." 447 U.S. at 564. The lower court's opinion describes alternative ways that Congress could accomplish the asserted objectives without imposing a blanket, content-based prohibition on unsolicited mailings about contraceptives. *See* 526 F. Supp. at 829-30.[31]

There is no merit to the Government's argument that Section 3001(e)(2) is not unnecessarily restrictive of speech. The Government's reliance, Gov't Br. 27-28, on the "dirty words" broadcasting case, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), is wholly inappropriate. Broadcasting is "uniquely pervasive," *id.* at 748, and more intrusive in our daily lives than the receipt of mail. As this Court noted in *Pacifica*, "because the broadcast audi-

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[31] We agree with the lower court's discussion of the availability of the less-restrictive alternatives. We do not, however, agree with the court's attempt to "enact" those alternatives into law. The court should have simply declared the statute unconstitutional and left to Congress the question whether to enact an alternaive regulatory scheme.

ence is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." *Id.* In addition, "broadcasting is uniquely accessible to children, even those too young to read." Therefore, while "[o]ther offensive expression may be withheld from the young without restricting the expression at its source," such is not possible with the electronic media. *Id.* at 748-49. These two factors—pervasiveness and accessibility of the broadcast media to children—clearly distinguish *Pacifica* from the unsolicited mail restriction contained in Section 3001(e)(2). Furthermore, the Federal Government has long been recognized as having a special interest in the regulation of the broadcast media,[32] and its civil regulation of broadcast services in no way supports a criminally punishable statute involving a non-broadcast medium of communication. *See Consolidated Edison*, 447 U.S. at 543.[33]

The Government also misses the mark when it argues that the "availability of unsolicited mail cannot be scheduled for times when children are unlikely to be exposed to it." Gov't Br. 28. Any parents who genuinely wish to control their children's unsupervised access to mail can do so simply by using a mailbox that can be locked or one that children cannot reach, and by taking care not to leave mail within their children's reach. An Act of Congress banning communication through the mail is hardly necessary.

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[32] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-390 (1969).

[33] The Government's efforts to equate mail with billboards and sound trucks is equally unpersuasive. *See* Gov't Br. 26-27. Communication through the mailbox does not raise the captive audience problems associated with billboards, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), sound trucks, *Kovacs v. Cooper*, 336 U.S. 77 (1949), or advertisements displayed on placards in public transportation, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

In a case such as this, involving information that is truthful, nonobscene, and of immense public and private value, *any* restriction on unsolicited mailings is too restrictive. If a recipient finds a sender's mailing to be sexually provocative and does not wish to be exposed to subsequent mailings, he or she can accomplish that by invoking the procedures Congress has already provided for that purpose. *See* 39 U.S.C. § 3008 (1976). And exposure to the initial mailing can be easily limited "simply by transferring the [material] from envelope to wastebasket." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 542.[34] These avenues of relief are perfectly adequate, and any attempt to provide greater relief by an outright ban on unsolicited mailings is, we submit, constitutionally impermissible.

III. THERE IS NO MERIT TO THE GOVERNMENT'S ARGUMENT THAT SECTION 3001(e)(2) DOES NOT SIGNIFICANTLY RESTRICT SPEECH.

The Government concedes at the outset that Section 3001(e)(2) curtails commercial speech. Gov't Br. 14. The Government's analysis should therefore, under the Government's own view of the case, have proceeded directly to the factors prescribed in the *Central Hudson* test. Instead, the Government embarked on a lengthy digression intended to show that Section 3001(e)(2) in-

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[34] *See also Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 449 (2d Cir.), *cert. denied*, 391 U.S. 915 (1967), where Judge Frankel made the same point in the context of unsolicited advertisements resulting from the sale of motor vehicle registration records to commercial enterprises:

> "The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect the privacies of life. The short, though regular, journey from mail box to trash can—for the contents of which the State chooses to pay the freight when it facilitates the distribution of trash—is an acceptable burden, at least so far as the Constitution is concerned." *Id.* at 883.

vades constitutionally protected rights only slightly. *See* Gov't Br. 16-24.

The Government's discussion misses the point. Once a statute restricts protected commercial speech, the statute must pass the requisite constitutional test if it is to stand—and this is so whether the statute is very restrictive or only slightly restrictive. As we have shown in Part II of this brief, Section 3001(e)(2) does not pass any such test. But the Government's discussion is flawed in any event. A correct analysis shows that Section 3001(e)(2) substantially burdens the flow of truthful and lawful commercial information.

A. Contrary to the Government's Assertion, the Statute Significantly Interferes With the Free Flow of Information About Contraceptives to a Large Portion of the Public.

The Government's argument that Section 3001(e)(2) restricts protected commercial speech only slightly rests on the assumption that, with respect to unsolicited advertising, the entire public may be divided into two distinct groups: first, a group of persons who wish to receive such information, will actively seek it out themselves, and are therefore not hurt by a ban on the mailing of unsolicited advertisements; and second, a group of people who do not want to receive unsolicited advertisements and are therefore not hurt by such a ban. Gov't Br. 17. If it were correct, this neat and convenient analysis might indeed suggest that Section 3001(e)(2) burdens the First Amendment only slightly. But the analysis is wrong.

Not only is the Government's attempt to dichotomize the consuming public totally unsupported by anything in the record or in the Government's brief; it is also contrary to the available evidence. In fact, the Postal Service's own research concerning unsolicited direct mail advertising suggests that consumers view themselves as fall-

ing into four categories, rather than two.[35] The first is a sizable group of people who generally find the information contained in unsolicited mail "useful" and like to receive it. The second and third are similarly large groups of people who either find such information interesting but not especially "useful," or who are generally indifferent to it. And the fourth is a very small group of people who generally find unsolicited mail objectionable.[36]

These results undermine the Government's analysis. The studies demonstrate that there is a large class of consumers who probably would not actively solicit mailings themselves but are not bothered by unsolicited mailings and are willing to receive them. A statute banning the mailing of unsolicited advertisements therefore does significantly curtail the free flow of truthful and otherwise lawful information to a large segment of the public, and Section 3001(e)(2) thus imposes a substantial burden on the public's First Amendment right to receive such information.[37]

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[35] The United States Postal Service has commissioned studies of consumer attitudes toward direct, unsolicited mail. The most recent studies were undertaken in 1975, 1974 and 1972, and their results are reported in *The Household Mainstream: 1972, 1974, 1975*, prepared by the Postal Service's Market Research Division and dated January 1976.

[36] Specifically, the studies indicate that more than 40% of those surveyed found the information contained in unsolicited mail "useful" and like to receive it; another 4% found it "objectionable"; approximately 40% fell somewhere in between; and the remainder either did not know how they felt or did not answer. *Id.* at 10. The figures show little change from one year to the next.

[37] The three-judge district court in *Associated Students v. Attorney Gen.*, 368 F. Supp. 11 (C.D. Cal. 1973), reached the same conclusion:

> "The prohibition of unsolicited, mailed information about contraceptives or abortions denies to many persons the knowledge, otherwise lacking, necessary to enable them to make an informed decision as to whether to bear children." *Id.* at 21.

B. The Availability of Alternative Channels of Communicating Information About Contraceptives Is Irrelevant.

The Government argues that Section 3001(e)(2) is not very restrictive of speech because it forecloses only the mails and leaves other avenues of communication open. Gov't Br. 17. This argument also fails.

Despite the Government's assertion to the contrary, Gov't Br. 21-22 n.10, Section 3001(e)(2) is a content-based restriction on protected commercial speech; by its express terms, it bans the mailing of unsolicited advertisements solely on account of their content. And as this Court has repeatedly held, the availability of alternative channels of communication is irrelevant in determining the constitutionality of a content-based restriction on speech including commercial speech.[38]

The *Consolidated Edison* case well illustrates the irrelevance of alternative avenues of communication. The Court there overturned an order of the Public Service Commission barring public utilities from mailing to their customers bill inserts that discuss controversial issues of public policy. Ample alternative channels of expression were open to the utility companies. They could easily have bought radio or television time or purchased newspaper advertisements. They could just as easily have sent mailings to the general public, not only to their customers.[39] These facts did not affect the Court's decision. Indeed, the Court expressly declared the irrelevance of those facts by noting that "we have consistently re-

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[38] *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 541 n.10; *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 n.15 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (*per curiam*).

[39] *Compare First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

jected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." 447 U.S. at 541 n.10.[40]

CONCLUSION

For the foregoing reasons, this Court should hold 39 U.S.C. § 3001(e)(2) unconstitutional under the First Amendment.

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[40] To be sure, where a restriction on speech is sought to be justified as a "time, place, and manner" restriction, the availability of alternative channels of communication does become relevant. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 535, 541 n.10. But Section 3001(e)(2) cannot be justified as a "time, place, and manner" restriction, and the Government has not attempted to do so.

In any event, the statute in fact does not leave open adequate alternative channels of communication. Under the Code of the National Association of Broadcasters (which, though recently suspended, still carries great influence), contraceptive advertising is not permitted on television or radio. And, such advertising is restricted and not widespread in the print media.

Amicus Brief

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No. 81-1590

IN THE

Supreme Court of the United States

October Term, 1982

WILLIAM F. BOLGER, *et al.*,

Appellants,

v.

YOUNGS DRUG PRODUCTS CORP.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* OF PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AMERICAN ASSOCIATION OF SEX EDUCATORS, COUNSELORS AND THERAPISTS, AMERICAN PUBLIC HEALTH ASSOCIATION, ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, INC., CENTER FOR POPULATION OPTIONS, NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC. and SOCIETY FOR ADOLESCENT MEDICINE

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October 14, 1982

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No. 81-1590

IN THE

Supreme Court of the United States

October Term, 1982

WILLIAM F. BOLGER, *et al.*,

Appellants,

v.

YOUNGS DRUG PRODUCTS CORP.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* OF PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AMERICAN ASSOCIATION OF SEX EDUCATORS, COUNSELORS AND THERAPISTS, AMERICAN PUBLIC HEALTH ASSOCIATION, ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, INC., CENTER FOR POPULATION OPTIONS, NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC. AND SOCIETY FOR ADOLESCENT MEDICINE

PRELIMINARY STATEMENT

Planned Parenthood Federation of America, American Association of Sex Educators, Counselors and Therapists, American Public Health Association, Association of Planned Parenthood Physicians, Center for Population Options, National Family Planning and Reproductive Health Association and Society for Adolescent Medicine file this brief *amici curiae* with the consent

of both parties in order to put before the Court the views of the health care organization *amici curiae* that 39 U.S.C. § 3001(e)(2), which prohibits the mailing of unsolicited contraceptive advertisements except to certain health care professionals, is unconstitutional. The United States District Court for the District of Columbia held 39 U.S.C. § 3001(e)(2) to be unconstitutional in *Youngs Drug Products Corp.* v. *Bolger*, 526 F. Supp. 823 (D.D.C. 1981). This Court noted probable jurisdiction on May 17, 1982 (J.A. 47).

INTEREST OF *AMICI CURIAE*

Amici are health care organizations that are vitally concerned with the issues of this case. A free flow of information concerning contraceptive methods, including advertisements for contraceptives, is essential to ensure that the public is fully educated concerning the availability and proper use of contraceptives.

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc., ("Planned Parenthood") is a not-for-profit corporation organized in 1922, headquartered in New York City, and existing under the laws of the State of New York. It is the leading national voluntary public health organization in the field of family planning.

Planned Parenthood has 190 affiliates in forty-three states and the District of Columbia. Each affiliate is a separate not-for-profit entity. These affiliates operate approximately 691 family planning clinics offering services to the public. Most affiliates offer medical and counseling services which include gynecological examinations, screening and treatment for sexually transmitted diseases, sex education, pregnancy testing and counseling and provision of prescription and nonprescription contraceptives. Thirty-seven affiliates offer abortion services as part of their programs. Four affiliates are educational units without medical services.

Planned Parenthood provides its affiliates with guidance in the areas of contraception, voluntary sterilization, infertility, abortion, sex education and education for marriage and parenthood. Each of the affiliates offering medical services functions under strict medical standards promulgated by Planned Parenthood's National Medical Committee in conjunction with local medical committees. The National Medical Committee consists of leading experts in the fields of obstetrics and gynecology, epidemiology, pharmacology, oncology, and public health. Local committees are made up of health professionals, a large majority of whom are physicians.

Planned Parenthood opposes restrictions on the availability of contraceptive information and products because such restrictions are contrary to the public health and welfare. Through the years, Planned Parenthood has learned that an unwanted pregnancy can be harmful, not only to the woman's physical and emotional health, but also to the psychological, physical and economic welfare of the family. The damage is particularly severe for minor females as pregnancy poses substantial medical risks for teenagers and often significantly limits young women's educational and career opportunities.

American Association of Sex Educators, Counselors and Therapists

The American Association of Sex Educators, Counselors and Therapists is a national nonprofit membership organization founded in 1967. Its aims are to assist those professionals responsible for sex education, counseling and therapy programs by providing training and standards of competency in these areas.

American Public Health Association

The American Public Health Association (APHA) is a national, nongovernmental organization established in 1972 with the objective of protecting and promoting personal and environmental health. APHA is the largest public health organization in the world, with a membership of 50,000, and includes fifty-one

state and local affiliate organizations. The organization has a diverse membership including directors and top level officials in state and local health departments, professors and administrators of schools of public health, and high-ranking officials in various federal agencies. Within the membership, both professional health workers and consumers act in a leadership role to develop a national health policy for the provision of equitable and quality health care for all citizens.

APHA strongly favors greater public access to accurate and responsible information on health matters including those involving sexual behavior. Increased knowledge of and access to fertility control measures for men and women can serve as a preventive measure to reduce the spread of venereal diseases and the number of unwanted pregnancies and abortions. APHA believes truthful and responsible advertising of health-related products and services can be a legitimate and constructive form of health education even while it serves a profit-making function. To that end, APHA passed a resolution in 1980 encouraging the extensive promotion of contraceptive information.

In view of the Association's expertise in the field of public health, and its long-term commitment to the widespread dissemination of information about contraceptive methods, the Association seeks to bring to the Court's attention the public health implications of prohibiting the mailing of contraceptive information on an unsolicited basis.

Association of Planned Parenthood Physicians, Inc.

Association of Planned Parenthood Physicians, Inc. (APPP), a New York not-for-profit corporation organized in 1974, works closely with Planned Parenthood. APPP is the successor to the American Association of Planned Parenthood Physicians, an unincorporated association which was organized in 1963. APPP has 670 members, all of whom are physicians or other health professionals associated with family planning.

APPP was formed for scientific, educational and charitable purposes and specifically to promote the ongoing interest in family planning in order to improve the stability and health of the family through responsible parenthood.

Center for Population Options

The Center for Population Options (CPO) is a national public interest organization concerned with the prevention of unintended adolescent pregnancy. CPO's projects are designed to assist adolescents in making informed choices about sexuality and parenthood. Widespread availability of contraceptive information plays a crucial role in the reduction of unwanted teenage pregnancies.

National Family Planning and Reproductive Health Association, Inc.

The National Family Planning and Reproductive Health Association, Inc. (NFPRHA) is a national private nonprofit membership organization headquartered in Washington, D.C., devoted to the improvement and expansion of the delivery of family planning and reproductive health care services. NFPRHA's members—which include Planned Parenthood affiliates, independent private nonprofit umbrella family planning councils and individual family planning clinics, hospitals and state, county and local agencies—are committed to establishing and maintaining reproductive health care as a high priority preventive health care service in this country. NFPRHA's members believe that unfettered access to information about reproductive health care services and products, including contraception and contraceptive products, is essential to maintain the health and well-being of the citizenry of this country.

Society for Adolescent Medicine

The Society for Adolescent Medicine is a national organization of health care providers to the adolescent population. It consists of 900 active members all of whom are physicians and other health professionals.

SUMMARY OF ARGUMENT

Section 3001(e)(2) of title 39 of the United States Code defines as nonmailable any unsolicited advertisement of matter which is designed, adapted or intended for contraception unless the advertisement is mailed to certain professional health care providers, *e.g.*, physicians, nurses, and pharmacists. In an earlier, unconnected case, the District Court for the Central District of California held the statute to be unconstitutional as it applies to mailings from entities with no commercial interest in the materials. *Associated Students* v. *Attorney General*, 368 F. Supp. 11 (C.D. Cal. 1973). The Postal Service has accepted that holding, and thus limits the reach of § 3001(e)(2) to those mailings in which the mailer has a financial interest. Domestic Mail Manual § 123.434.

Limiting the reach of § 3001(e)(2) to commercial mailings does not eradicate the fundamental constitutional infirmities of the statute. No evidence was presented, either to Congress before § 3001(e)(2) was enacted or to the District Court in this case, to support the Government's current rationale for the statute, *i.e.*, that contraceptive advertisements are more likely to offend addressees than other types of unsolicited messages (which can be mailed) and that unsolicited contraceptive advertisements might interfere with parents' abilities to educate their children about sex and contraception as they see fit. Logic and the empirical evidence which does exist lead to the conclusion that (1) contraceptive advertisements are unlikely to cause enough offense

to warrant characterizing prevention of the offense as a significant governmental interest or for distinguishing such advertisements from the plethora of unsolicited advertisements which can be mailed; and (2) such advertisements are not likely to cause undue interference with parents' sex education efforts.

Besides there being no significant governmental interest advanced by the statute, the burden on the First Amendment, U.S. Const. amend. I, and Fifth Amendment, U.S. Const. amend. V, rights of the intended recipients of these mailings and on the mailers themselves far outweighs any governmental interest which is served by the statute. The burden on the intended recipients is widespread ignorance of the availability of and proper use of contraceptive devices and methods. This continued ignorance exacts a high price from society in the form of unintended pregnancies, which often result in either unwanted children or abortions, and an epidemic of venereal disease. *Amici* are committed to educating the public as to the availability and proper use of birth control methods. No matter how devoted to the task, it is too large to be handled solely by *amici*. That appellee and other drug companies have an economic interest in disseminating this information should not overshadow the fact that their mailings have a significant informational component designed to reduce the current ignorance of birth control methods. To muzzle those who have an economic interest in making their views known because they have such an interest serves no valid governmental interest but serves only to silence an important source of valuable information.

Because the statute advances no significant governmental interest and because the interests it does advance are far outweighed by its burdens, the statute is unconstitutional and the order of the district court should be affirmed.

ARGUMENT

Section 3001(e)(2) of 39 U.S.C. violates the First Amendment rights of appellee and of recipients who wish to receive the

information appellee wishes to send. Moreover, because the statute prevents the dissemination of information relative to the fundamental right of all persons to decide whether to beget and bear children, *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), it also violates the constitutional right of privacy. *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). Statutes which implicate the right to privacy are subject to strict scrutiny by this Court. Thus, the statute must serve a compelling governmental interest and the statute must be narrowly tailored to advance that interest. *Id.* at 155.

According to the Government, 39 U.S.C. § 3001(e)(2) advances substantial governmental interests and its interference with free speech is in proportion to the interests served. Gov't Brief at 8-12. We do not concede that this commercial speech test, utilized by the Court in *In re R ___ M. J ___*, 102 S. Ct. 929 (1982), is appropriately applied in this case where the speech at issue concerns contraception, a matter entitled to special constitutional protection. *Carey* v. *Population Services International*, 431 U.S. 678, 700-02 (1977); *Bigelow* v. *Virginia*, 421 U.S. 809, 822 (1975). Even applying that lesser test, however, the statute is unconstitutional because the interests allegedly served by the statute are not substantial and the interference with free speech is far out of proportion to the interests which are being served.

I. 39 U.S.C. § 3001(e)(2) DOES NOT ADVANCE SIGNIFICANT GOVERNMENTAL INTERESTS.

The Government contends that § 3001(e)(2) serves two interests, both of which are asserted to be substantial. The first interest asserted is the protection of sensitive addressees; the second is the protection of parents from unwanted interference with their discussions of sex and contraception with their children. Curiously, the Government advanced neither interest nor any other interest when this statute was challenged in *Associated Students* v. *Attorney General*, 368 F. Supp. at 22. Though it now asserts that some interests are purportedly advanced by the statute, "the mere recitation of a . . . purpose is not an automatic

shield which protects against any inquiry into the actual purposes underlying a statutory scheme". *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975) (footnote omitted). Although in some situations protection of addressees from unwanted mail and protection of parents' sex education efforts may be legitimate interests of the Postal Service,[1] the inescapable conclusion in this instance is that these are no more than *ex post facto* rationales articulated to save a statute which reflects out-dated, moralistic presumptions of what is suitable to travel through the United States Mail.[2]

A. Protection of Sensitive Addressees

Several factors point to the conclusion stated above, *i.e.*, that the asserted rationale of the statute and Congress' purpose in enacting it are not the same. First, and most fundamental, if there are not a large number of people in the country who would object to the material at issue, then whatever interest the Government has in protecting them cannot be characterized as "substantial". The necessity for establishing widespread opposition to receipt of such mail was implicitly acknowledged by the Government when it asserted (without supporting authority) that "many persons" find commercial advertisements of "matter[s] like contraception . . . to be offensive". Gov't Brief at 12.

[1] *But see Carey* v. *Population Servs. Int'l*, 431 U.S. at 701 ("But [protecting people from offense and embarrassment] are classically not justifications validating the suppression of expression protected by the First Amendment.")

[2] If the protection of sensitive addressees were the interest Congress was seeking to vindicate when it enacted this statute, and we doubt it was (see pp. 12-13, *infra*), the District Court's Order clearly vindicates that interest. While we do not agree that labeling the outside of envelopes to indicate a contraceptive advertisement is enclosed is necessary, such a solution permits "sensitive addressees" and parents who would object to their children seeing such an advertisement to exercise control over their unwanted mail, *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 736 (1970), without imposing on the First Amendment rights of all other addressees. Given the availability of such a simple solution to the problems articulated by the Government, it is clear that § 3001(e)(2), as drafted, is not narrowly drawn, but regulates far further than is necessary to serve the Government's interest. *See In re R ___ M. J ___*, 102 S. Ct. at 937.

The Government's *ipse dixit* notwithstanding, there is considerable doubt that enough people would find the advertisements at issue to be offensive to warrant characterizing such persons' protection as a "substantial" governmental interest. Contraceptive products have been advertised in national consumer magazines for years without significant outcry.[3] Julius Schmid, Inc., a manufacturer of condoms, reported that after three years of advertising in consumer magazines, including McCall's and Modern Bride, and one newspaper, the San Francisco Chronicle, it had received 180,000 letters of comment, of which only 10 to 15 raised any objections. M. Redford, G. Duncan & D. Prager, The Condom: Increasing Utilization in the United States 118-20 (1974) [hereinafter cited as Redford]. In 1973 McCall's and Modern Bride alone had a combined circulation of over 7.8 million, and approximately one-half million people subscribed to the San Francisco Chronicle. 1974 Ayer Directory of Publications 177, 621-22. Appellee, Youngs Drug Products Corp., has advertised its products in such magazines as Family Health, Ladies' Home Journal, Parents', Psychology Today, Bride's and Look.[4] Redford, *supra*, at 145.

Had these advertisements been only in magazines where the predominant subject matter is sexuality, an argument could be made that the lack of complaints indicates nothing—the predominant subject matter of the magazines is sexuality and thus a contraceptive advertisement would certainly not be unexpected. On the other hand, the fact that the ads ran without objection in such family-oriented, general distribution magazines as McCall's, Look, Ladies' Home Journal and Psychology

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[3]In accordance with our role as *amici curiae*, we will endeavor to draw the Court's attention to a variety of publicly available studies and other published materials which bear upon the issues in this case, and which, because of their public nature, are matters of general knowledge. *See* Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L. J. 694 (1963).

[4]The ads were first accepted in Family Health, Psychology Today, and Ladies' Home Journal in 1970. Redford, *supra*, at 145. At that time Psychology Today and Ladies' Home Journal alone had a combined circulation of approximately 7.5 million. 1971 Ayer Directory: Newspapers, Magazines and Trade Publications 83, 746.

Today—magazines whose predominant subject matter is not sexuality—suggests widespread acceptance of, as opposed to offense from, contraceptive advertisements.[5]

It is not surprising that there would be few complaints about contraceptive ads, given that Americans are, as a whole, philosophically in favor of birth control. In a poll recently conducted by the National Opinion Research Center, 92.3% of those questioned about laws curtailing the distribution of information about birth control responded that such information should be freely available, and 88.1% thought birth control information should be freely available to teenagers.[6]

This evidence of widespread acceptance of contraceptive information is particularly significant when it is recalled that § 3001(e)(2) was not a response by Congress to any problem associated with commercial advertisements for contraceptives. Rather, it is the direct descendant of a scheme of laws originally passed by Congress in 1873 directed against the shipping or importation of obscene or immoral materials, including contraceptive information (commonly called the "Comstock Laws" after their principal advocate, Anthony Comstock). 16 R.S. § 3893 (1876).

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[5]Such advertisements are exempted from the prohibitions of § 3001(e)(2)—they are deemed by the statute *not* to be unsolicited because the addressee paid or promised to pay for the magazine. But soliciting a magazine hardly establishes that in fact the addressee solicited or expected to receive all the included advertisements. Accordingly, lack of protest cannot be attributed to expectation. Rather, the only plausible explanation is widespread acceptance of and lack of objection to such advertisements.

[6]The National Opinion Research Center is a center for statistical and sociological research which operates under the aegis of the University of Chicago. The Center maintains its own staff of independent researchers who formulate and conduct research on various topics of public concern. The results of their work are in the public domain and are available to scholars, students, academics, government agencies, and anyone else who may be interested in their findings. Results are published annually in *General Social Surveys*, National Opinion Research Center, University of Chicago, 6030 S. Ellis Ave., Chicago, Illinois 60637.

The survey cited in the text was conducted by NORC in the summer of 1982.

The Comstock Laws were revised in 1970 by H.R. 4605, which amended the Tariff Act of 1930. The Ways and Means Committee received favorable reports from the Departments of Health, Education and Welfare, Commerce, State, Labor, Treasury and Post Office to the revision which, as initially proposed, prohibited only the unsolicited mailing of contraceptive *articles* to anyone other than certain listed "authorized parties" in the health and pharmaceutical professions. H.R. Rep. No. 91-1105, 91st Cong., 2d Sess., at 3 (1970). Apparently as an afterthought, "at the suggestion of the Post Office Department", the Committee amended the statute "to continue the prohibition against the mailing of advertisement [sic] with regard to articles for preventing conception if unsolicited or if not mailed to a licensed person [those authorized to receive unsolicited samples]". *Id.*

The legislative history of § 3001(e)(2) should be contrasted with that of 39 U.S.C. §§ 3008 and 3010. (Section 3008 permits an addressee to remove his name from the mailing list of anyone who sends erotically arousing or sexually provocative mail; § 3010 prohibits any person from sending sexually explicit advertisements to anyone who has notified the Postal Service that he does not wish to receive such advertisements through the mail.) At congressional hearings before those laws were enacted, evidence was presented showing a substantial number of complaints to the Postmaster concerning the use of the United States Mail to distribute sexually explicit advertisements. *Rowan,* 397 U.S. at 732. Faced with the empirical evidence that persons were receiving mail which they deemed to be offensive, Congress reacted by passing §§ 3008 and 3010. It is significant that even in the face of such evidence, Congress did not react by prohibiting the mailing of all sexually explicit advertisements but only prohibited mailing such materials to households which have indicated they do not wish to receive them.

Faced with a situation where it knew addressees were objecting to certain types of mail, *i.e.,* sexually explicit mail, Congress

passed a law which permits advertisers to send unsolicited mailings to any household in the United States which has not specifically stated it does not wish to receive such materials. On the other hand, faced with a situation where it knew not whether any addressee would object, *i.e.*, contraceptive advertisements, Congress reenacted the puritanical provision of the Comstock Laws which prohibits all advertisers from sending any unsolicited contraceptive advertisement to any household in the United States. Despite the Government's protestations to the contrary (Gov't Brief at 21-24), such a measure can only reflect arbitrary behavior or antagonism to the message conveyed—either is unconstitutional. *See Carey* v. *Population Services International*, 431 U.S. at 701 n.28 (restrictions on speech, whether commercial or noncommercial, cannot be justified by arguments "directed . . . at the ideas conveyed and form of expression—the core of First Amendment values"); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502-03 (1977) (zoning ordinance which prohibited a grandmother and her grandchild from being considered a "family" held to be arbitrary and thus unconstitutional); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972) (restriction which prohibited all picketing near a school except labor picketing held to be unconstitutional because not content neutral).

Whether the Government is antagonistic to the message conveyed by commercial contraceptive advertisements, the fact is that there is no evidence to support the Government's assertion that protection of sensitive addressees was a problem Congress sought to address in passing § 3001(e)(2) nor to support the Government's assertion that any significant number of people would be offended by these advertisements. While in some instances there may be a demonstrated need to protect so-called "sensitive addressees", there was no such demonstration before Congress passed the statute nor did the Government make such a demonstration to the District Court.[7]

[7]Moreover, as noted above, note 2, *supra*, even the most sensitive addressee the Government may hypothesize is protected by the order of the District Court requiring the labeling of the envelopes.

B. Protection of Children

The second interest which the Government asserts is advanced by this statute is the protection of those parents who would perceive this information as an undue interference with their efforts, or lack thereof, to educate their children about birth control. Gov't Brief at 25-30. *Amici* strongly endorse the Government's position that sex education and birth control education should begin at home. Inasmuch as there is no evidence, as opposed to pure speculation, that there are any parents who would find that this information might interfere with their children's sex education, *amici* take issue with the Government's position that this interest is strong enough to justify a total ban on unsolicited commercial contraceptive mailings and with its position that the protection of these hypothetical parents is a purpose of this statute.

While protection of parents' desire to rear and educate their children as they see fit is a legitimate governmental goal, it is not such a significant interest that adults may be reduced to an environment so bland that it is uniformly acknowledged by parents to contain only messages which they consider to be safe for their children. *See Butler* v. *Michigan,* 352 U.S. 380 (1957); L. Tribe, American Constitutional Law 680 (1978).

Moreover, the Government's position completely ignores the fact that the children of the parents it is seeking to "protect" from this information themselves have significant First Amendment rights with which this statute interferes. *See Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969). While the First Amendment rights of minors are not "co-extensive with those of adults", *id.* at 515 (Stewart, J., concurring),

> "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 213-14 (1975).

In *Erznoznik*, the City of Jacksonville sought to justify an ordinance that prohibited drive-in theaters from showing movies which depict nudity by arguing it was enacted to protect children. This Court held that because under *Ginsberg* v. *New York*, 390 U.S. 629 (1968), there are movies which contain nudity but are not obscene for children, the statute was overbroad and unconstitutional.

In contrast to the situation in *Erznozik*, here we are not dealing with access to entertainment but, rather, access to information about a fundamental personal right. *See, e.g., Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Eisenstadt* v. *Baird*, 405 U.S. at 453; *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The right to privacy in matters affecting procreation extends to minors. *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 72-75 (1976). A necessary corollary of the right to privacy for minors is their right to obtain contraceptives. *See Carey* v. *Population Services*, 431 U.S. at 694. It would be anomalous, indeed, if the Constitution protected minors' rights to obtain contraceptives but, in the name of protecting their parents' right to educate them as they see fit, did not protect their right to receive information concerning contraceptives without governmental interference. Given the record numbers of teenage pregnancies and abortions, it is imperative that birth control information be disseminated, without restriction, to parents and their adolescent children.[8]

Finally, although the Government asserts that this statute advances its interest in preventing interference with parents' rights to educate their children concerning birth control in the manner they feel is best, given the other types of material which can be mailed under the postal statutes, it is hard to believe the

[8]In 1978, over one-third (approximately 5 million) of all females aged 13-19 were sexually active. Dryfoos, *Contraceptive Use, Pregnancy Intentions and Pregnancy Outcomes Among U.S. Women*, 14 Fam. Plan. Persps. 81 at 83 (1982) [hereinafter cited as Dryfoos]. Approximately 30% of all sexually active teenaged females (*i.e.*, 1.7 million) became pregnant during 1978; over 70% of these pregnancies were unintended (approximately 1.2 million). *Id.* at 88. Almost one-half million teenagers had abortions during 1978. *Id.* Girls 14 or younger accounted for almost 30,000 pregnancies. *Id.* at 83 n.+.

Government really considers this noninterference goal to be important. The most glaring examples of the underinclusiveness of the statutory scheme (given this "noninterference" goal) are 39 U.S.C. § 3008 and § 3010, which, as noted above, permit an advertiser to send pandering and sexually explicit advertisements to any addressee.[9] Under §§ 3008 and 3010, the only limitation on an advertiser is that it may not send material to any addressee who has notified the Postmaster that he does not wish to receive further mailings from a given advertiser, or that he does not wish to receive any sexually explicit advertisements. Thus, both statutes put the burden on the "sensitive addressee", see Gov't Brief at 35, rather than on the advertiser and the addressee who wants or would not object to the material at issue. There can be no question but that material which can be mailed under §§ 3008 and 3010 absent affirmative action by the addressee is more likely to be perceived by parents as capable of interfering with their sex education efforts than the informational material appellee seeks to distribute in this case.[10]

It requires no imagination to point out numerous other situations as likely to interfere with parents' sex education efforts as receipt of the material appellee wishes to mail. For example, a child who saw one of appellee's ads in Parents' magazine could well raise the subject of contraception with his or her parents at a time they considered premature, yet such advertisements are permitted under the law. Abortion, birth control and sex are normal subjects for television, and the treatment there ranges from soap operas during the daytime to situation comedies and movies in the

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[9]While underinclusiveness alone is not a reason to declare a statute unconstitutional, the more underinclusive a statutory scheme, the less likely the asserted rationale is the interest being advanced by the statute. *See, e.g., Weinberger* v. *Wiesenfeld,* 420 U.S. at 650.

[10]A sexually explicit advertisement is defined as

> "any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing." 39 U.S.C. § 3010(d).

evening.[11] Finally, appellee's proposed mailings are no more likely to interfere with parents' sex education efforts than are television and print ads and unsolicited commercial mailings to the home concerning other products.[12]

Given the Government's asserted interest, the significant underinclusiveness of the statute is inexplicable and is so severe as to render § 3001(e)(2) arbitrary beyond salvage. Moreover, the solicitude which the Government has shown sexually explicit advertisements, putting the burden on "sensitive addressees" rather than on society in general as has been done with contraceptive ads, see Gov't Brief at 35, is impossible to explain except that it reflects lingering antagonism to the subject of contraception or is pure arbitrariness. Neither is sufficient to withstand constitutional scrutiny. *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Police Department of Chicago* v. *Mosley*, 408 U.S. at 95 ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter or its content").

Upon analysis, neither the protection of "sensitive addressees" nor the protection of children's sex education is the purpose of or is furthered by the statute. Thus, before the balancing process required by the First Amendment even begins, the statute fails for lack of legitimate purpose.

II. THE BURDEN ON FIRST AMENDMENT RIGHTS FAR OUTWEIGHS THE GOVERNMENTAL INTERESTS THE STATUTE PURPORTS TO ADVANCE.

The Government asserts that § 3001(e)(2) is no more burdensome than necessary to serve the interests discussed above. In

[11]For example, several years ago it was reported that the major characters in the popular daily soap opera General Hospital were involved in four divorces, two premarital pregnancies and four extramarital affairs. Kinzer, *Soapy Sin in the Afternoon*, Psychology Today 46 (August 1973).

[12]For example, see the flyer advertisement at J.A. 16-19. The ads for Playtex Deodorant Tampons and Stayfree Maxi-Pads (J.A. 17) are at least as likely to generate "untimely" questions from inquisitive children as the ad for Trojan Condoms (J.A. 19).

fact, however, § 3001(e)(2) is considerably more burdensome than is necessary, and the burden is far out of proportion to the interests advanced.

The underpinning of the Government's argument that § 3001(e)(2) does not burden First Amendment rights is the presumption that no one really wants the material which is at issue in this case. See Gov't Brief at 19, 21.[13] According to the Government, then, there is no countervailing societal interest to outweigh the governmental interest (however weak) the statute allegedly advances. Moreover, according to the Government, this statute does not prevent any willing recipient from receiving the materials at issue but only burdens the advertiser by requiring it to engage in pre-mailers, *i.e.*, letters asking the potential recipient if he or she wants the material. This burden is deemed insignificant because in the Government's analysis the First Amendment protects commercial speech based on its value to the listener, not to the advertiser. Gov't Brief at 19-20.

The Government's analysis of the burden of the statute is flawed in that the right to receive advertising and the right to advertise have been held by this Court to be reciprocal rights. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). Thus, to the extent a statute burdens an advertiser, it burdens the reciprocal right to receive the advertising. Moreover, the Government's analysis conveniently ignores the very real burden § 3001(e)(2) places on those who want and/or need the information appellee seeks to provide. These people, who clearly are protected by the First Amendment, are burdened by having to request the information.

[13]Thus the Government baldly states: "[I]t is implausible to suggest that this source of information [unsolicited advertisements] is of great importance to people making 'private and sensitive' decisions about contraception." Gov't Brief at 21 (citations omitted). While it may strike the Government as implausible, American companies spend billions of dollars each year on advertising based on the belief that advertising (virtually all of which is unsolicited) does affect people's behavior and buying habits.

That is precisely the burden which was on the plaintiffs in *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). In holding it to be an unconstitutional burden, this Court wrote:

> "We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him." 381 U.S. at 307.

While it might be argued that in an objective sense being required to request the information is not a terribly onerous burden on any one person, given the admitted importance of and constitutionally protected nature of this information *any* burden should be strictly scrutinized. Moreover, when placed on an entire nation, this burden has led to a substantial curtailment of the free flow of information guaranteed by the First Amendment and has contributed to the widespread ignorance, to this day, of safe and effective contraceptive methods. While it is true that the Government has not foreclosed every source of such information, it has foreclosed the avenue which is certainly among those most likely to be successful in educating the public. Because appellee and others in its market have an economic interest in educating consumers about birth control products, it is likely that through advertising they can reduce considerably the current public ignorance.[14]

There can be no argument with the proposition that there is public ignorance concerning contraception. One sign of this ignorance is the number of unintended pregnancies. In 1978 alone, for example, an estimated 4.4 million of America's 37.1 million sexually active, fecund women were unintentionally pregnant. Dryfoos, *supra* note 8, at 81. An additional 4 million

[14]For example, the brochure appellee sought to mail includes an explanation of the prophylactic and contraceptive effects of condoms, the correct way to use them and where they can be obtained. J. A. at 23-31.

women were risking an unplanned conception because they used a less effective contraceptive (*e.g.*, spermicides, rhythm, withdrawal) or none at all. *Id.*

An additional indicium of public ignorance concerning contraception is the fact that over 1.5 million legal abortions were performed in the United States during 1980 alone. This accounts for three percent of all reproductive-age women. Henshaw, Forrest, Sullivan & Tietze, *Abortion Services in the United States, 1979 and 1980,* 14 Family Planning Perspectives 5, 5 (1982). See also Dryfoos, *supra* note 8, at 88.

Public ignorance concerning the condom, which is one of the few modern contraceptives which effectively protect against the transmission of venereal disease, see Free & Alexander, *Male Contraception Without Prescription,* 91 Public Health Reports 437, 438 (1976) [hereinafter cited as *Male Contraception*], is evidenced by the current venereal disease epidemic. Gonorrhea ranks as the most frequently reported communicable disease in this country, with over one million cases reported during 1981. See Public Health Service, United States Dep't of Health & Human Services, *Summary—Cases of Specified Notifiable Diseases, United States,* 30 Morbidity and Mortality Weekly Report 638, 640 Table 1 (1982). The spread of genital herpes, which also affects Americans in epidemic proportions, Marzouk, Dall & Mills, *Genital Herpes: 1982,* 7 The Female Patient 12, 14 (1982) (the number of people with genital herpes is estimated to be between 5 and 20 million), may be prevented by use of a condom. Hastings, *Providing Hope for Herpes Patients,* 6 Sexual Medicine Today 8, 15 (1982).[15]

Ignorance about reproduction and fertility is not limited to the poor and the uneducated—it reaches all levels of society. Included in the estimated 8.4 million women who were either

[15]In contrast, in Sweden, where condoms can be and are widely advertised, *Male Contraception, supra,* at 44, the sexually transmitted disease rate is significantly lower than that of the United States. I. Dickman, *Winning the Battle for Sex Education* 43 (SIECUS Publication 1982).

unintentionally pregnant or were "at risk" of pregnancy in 1978 were 30% of all "low-income" women and 20% of all women not from "low-income" families. Dryfoos, *supra* note 8, at 81.[16]

Adolescents are particularly ignorant of proper contraceptive use and the need for it. For example, one study found that 70 percent of the sexually active adolescent females who did not use contraceptives told interviewers, naively and incorrectly, that such precautions were unnecessary because they could not become pregnant. The study concluded that "such ignorance often ends in abortion". Stokes, *Filling Family Planning Gaps* J-370 (Population Reports, Series J, September 1978). See also Ford, Zelnik & Kantner, *Sexual Behaviour and Contraceptive Use Among Socioeconomic Groups of Young Women in the United States*, 13 Journal of Biosocial Science 31, 95 (1981) ("large amount of risk-taking in all [socioeconomic] groups [of adolescent females]"); Green & Potteiger, *Teenage Pregnancy: A Major Problem for Minors* (Zero Population Growth 1977.)

Adolescent ignorance about contraceptives cannot be defended, legally or sociologically, on the ground that it deters teenage premarital sexual activity. *See Carey* v. *Population Services*, 431 U.S. at 695-96, 701 (Court rejected the state's contention that advertising contraceptives would legitimize teenage sexual activity). Moreover, there is nearly unanimous support among medical practitioners and social scientists for the view that limiting access to or information about contraceptives does not deter sexual activity. See, *e.g.*, Jaffe & Dryfoos, *Fertility Control Services for Adolescents: Access and Utilization*, 8 Family Planning Perspectives 167, 168 (1976); Moore & Caldwell, *The Effect of Government Policies on Out-of-Wedlock Sex and Pregnancy*, 9 Family Planning Perspectives 164 (1977); Zelnik & Kim, *Sex Education and Its Association with Teenage Sexual Activity, Pregnancy and Contraceptive Use*, 14 Family Planning Perspectives 117 (1982). A commission created jointly by the President and Congress stated the matter succinctly: "Ignorance

[16]The dividing line between "low-income" and "not low-income" was 150% of the 1978 poverty level, or a family income of approximately $10,000 for a family of four. Dryfoos, *supra* note 8, at 83 n.++.

does not serve to prevent sexual activity, but rather promotes the undesirable consequences of sexual behavior—unwanted pregnancy, unwanted maternity, and venereal disease". Report of the Commission on Population Growth and the American Future, *excerpts reprinted in Population and the American Future: Excerpts*, 3 Studies in Family Planning 77, 83 (1972).

Although *amici* endorse heartily the concept that sex education should be provided primarily in the home, many parents, although willing, cannot provide accurate information to their children about reproduction and contraception. For example, one study found that 82 percent of mothers were unaware of the period of time after ovulation that a woman can get pregnant. See Fox, *Mothers and Their Teenaged Daughters: A Report to the Participants in the Mother-Daughter Communication Project* (Merrill-Palmer Institute 1979). A government-sponsored study found that 98 percent of parents reported needing help in talking to their teenage children about sex. See Coughlin, *Family Planning and the Teenager: A Service Delivery Assessment* 44 (Report to the Secretary of Health, Education and Welfare 1978); see also *Teenage Pregnancy: The Problem that Hasn't Gone Away* (Alan Guttmacher Institute 1981).

The problem is self-evident—many Americans are ignorant of the availability of safe and effective contraceptive methods. Accordingly, it is simply not acceptable to view the burden of § 3001(e)(2) as insignificant. The cost to consumers of the ban on advertising of drug prices held to be unconstitutional in *Virginia State Board of Pharmacy* was estimated to be several million dollars annually. 425 U.S. at 765-66 n.20. The cost to consumers of the ban on contraceptive advertising is millions of unintended pregnancies, hundreds of thousands of unwanted children, millions of abortions and a venereal disease epidemic.

In light of the considerable societal cost of continuing to restrict a free flow of information about contraceptives, it cannot be seriously contended that the interference with free speech caused by § 3001(e)(2) is insubstantial. Moreover, because the interests the Government asserts this statute advances are insubstantial, if not nonexistent, it cannot be credibly argued that they outweigh its burdens. Accordingly, § 3001(e)(2) cannot pass even the Government's overly indulgent test of constitutionality.

CONCLUSION

Section 3001(e)(2) of title 39 of the United States Code violates the First Amendment to the United States Constitution and infringes on the right to privacy protected by the Fifth Amendment. It advances no substantial governmental interest and the burden on the American public far outweighs any interest advanced by the statute. The opinion of the district court should be affirmed.

Respectfully submitted,

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October 14, 1982

Docket Sheet

NO. 81-1590-ADX	TITLE William F. BOLGER, et al., Appellants v. Youngs Drug Products Corp.

DOCKETED	COURT
Feb. 25, 1982	United States District Court for the District of Columbia

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellants: Solicitor General
	Counsel for Appellee:
Dec. 19, 1981	Application for an extension of time to docket an appeal and order granting same until Feb. 27, 1982 by Burger, CJ, on Dec. 23, 1981.
Feb. 25, 1982	Statement as to jurisdiction filed.(Record filed).
Mar. 19, 1982	Order extending time to file a motion to dismiss or affirm until Apr. 26, 1982.
Apr. 26, 1982	Motion to affirm filed.
Apr. 28, 1982	DISTRIBUTED. 5-13.
May 3, 1982	Reply memorandum for the appellants filed. (D).
May 17, 1982	Probable jurisdiction NOTED.

July 2, 1982	Order extending time to file the joint appendix and appellants' brief on the merits until July 31, 1982.
Aug. 2, 1982	Order further extending time to file the joint appendix and appellants' brief on the merits until Aug. 14, 1982.
Aug. 13, 1982	Brief for the appellants filed.
Aug. 16, 1982	Joint appendix filed.
Sept. 8, 1982	Order extending time to file the appellee's brief on the merits until Oct. 14, 1982.
Oct. 14, 1982	Brief, amicus curiae, of The American Civil Liberties Union filed.
Oct. 18, 1982	Brief, amici curiae, of Planned Parenthood Federation of America, Inc., et al. filed.
Oct. 20, 1982	Brief for the appellee filed.
Nov. 17, 1982	CIRCULATED.
Jan. 5, 1983	Reply brief for the appellants filed. (D).
Jan 12, 1983	ARGUED.